1988

Reed Maxfield, and Utah's Great Game Preserve, a Utah corporation v. Owen A. Rushton and Carol Rushton, his wife : Owen A. Rushton and Carol Rushton, his wife v. State of utah, by and through Utah State Department of Social Services v. Reed Maxfield : Brief of Appellee

Utah Court of Appeals

Lorin N. Pace; Attorney for Plaintiff-Appellant. Henry S. Nygaard; Beaslin, Nygaard, Coke & Vincent; Attorney for Respondents.
David L. Wilkinson; Attorney General; Stephen G. Schwendiman; Bernard M. Tanner; Leonard E. McGee; Assistant Attorneys General; Attorneys for Co-Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

REED MAXFIELD, and UTAH'S GREAT GAME PRESERVE, a Utah corporation,

Plaintiffs, Appellants,

vs.

OWEN A. RUSTON and CAROL RUSHTON, his wife,

Defendants, Respondents.

Case No. 870424

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Third-Party Plaintiffs and Respondents,

vs.

STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third-Party Defendants, Third-Party Plaintiffs and Co-Respondents,

vs.

REED MAXFIELD,

Third-Party Defendant.

BRIEF OF THIRD-PARTY DEFENDANT AND CO-RESPONDENT STATE OF UTAH; APPEAL FROM SUMMARY JUDGMENT OF DISMISSAL, HONORABLE DAVID S. YOUNG, JUDGE; AND APPEAL FROM DENIAL OF MOTION FOR SUMMARY JUDGMENT HONORABLE JAMES S. SAWAYA, JUDGE OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

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LIST OF PARTIES

The parties to this action are:

1. Reed Maxfield, a Plaintiff, Third-Party Respondent, Assignee of Interest, and Appellant.

2. Utah's Great Game Preserve, a Plaintiff, Assignee of interest in Chapter 11 Proceeding, and Appellant.

3. Owen A. Rushton and Carol Rushton, his wife, Defendants and Respondents.

4. State of Utah, by and through Utah State Department of Social Services, Third-Party Defendant, Third-Party Plaintiff, and Co-Respondent.

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

Jurisdiction of the Supreme Court is pursuant to Utah Code Ann. Sec. 78-2-2(3)(i). This appeal is from an Order of the trial court dismissing the Plaintiff's cause of action because of the Plaintiff's failure to diligently prosecute.

NATURE OF THE PROCEEDINGS

A. The Plaintiff sued the Rushton's over the right of Possession of Property Rushton's acquired from an execution by the State of Utah and a sheriff's sale thereon October 1, 1980.

B. The Defendants Rushtons sued the State of Utah as a Third Party Defendant, claiming a right against the State if the State conducted sheriff's sale was determined invalid.

C. The State of Utah as a Third Party Defendant and thence Third Party Plaintiff sued Reed Maxfield, Plaintiff, now as a Third Party Defendant on a claim that Maxfield's claim of interest was based on fraud, and if the State were found liable, they had a valid cause of action against Maxfield for indemnification.

D. Plaintiff Maxfield filed a Chapter 11 Bankruptcy in Federal Court, naming his claim against Rushtons et al. as an asset of his debtors estate. The Plaintiff, as debtor, assigned his interest in the Third District Court action to a family-owned company, Utah's Great Game Preserve. The assignment was approved as part of the plan or reorganization for the debtor, Maxfield.

E. The matter of the legal action between Maxfield and Rushton, et al., was referred back to Third District Court.

F. A final trial setting was set on September 15, 1987, in Third District Court with pretrial set August 31, 1987.

G. Utah's Great Game Preserve, successor in interest to Maxfield and as moving Plaintiff appeared by counsel at pretrial along with all other counsel and Mr. Maxfield, and after a hearing the trial judge dismissed the entire case for failure of Plaintiff to diligently prosecute the matter.

ISSUES ON APPEAL

1. Whether the trial court abused its discretion in dismissing the Plaintiff's causes of action for failure to diligently prosecute.

2. Whether the trial court committed reversible error in denying Plaintiff's Motion For Summary Judgment based upon the pleadings, affidavits, and factual circumstances surrounding this transaction.

3. Whether the trial court committed reversible error in denying Plaintiff's Motion For An Order Granting Plaintiff The Immediate Right to Redeem prior to the trial of the case on its merits.

4. Whether the trial courts dismissal for failure to prosecute extinguished Plaintiff's claim of superiority over bona fide purchasers when Plaintiff's interest was being challenged as fraudulent in nature.

STATUTORY PROVISIONS

None.

STATEMENT OF THE CASE

Plaintiffs' action was dismissed at a final pretrial for the failure of the Plaintiffs to diligently prosecute the case, which action was originally filed in the Third District Court on October 20, 1980 (R 437-438). This is an appeal from the dismissal of that action.

The original action concerned the right of the Rushtons, Defendants/Respondents to two pieces of real estate purchased at a sheriff's sale (R 35, 41), and their right and priority in the property as against a previously executed but unrecorded deed to Maxfield, a partner in an alleged fraudulent transfer from an alleged defective corporation. The corporate and individual deeds were recorded on said properties after an appeal in the Utah Supreme Court was denied to the original conveyor, Lester R. Romero, in March, 1980. Romero was the unsuccessful defendant in the Supreme Court Appeal on the original judgment against him before Judge Condor in District Court in an action in welfare fraud in 1979. Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980).

This is now a continued action on appeal by the assignee, Utah's Great Game Preserve (R 269, 438-448), from the assignor, Reed Maxfield, from a Chapter 11 proceeding filed by Reed Maxfield in Federal Bankruptcy Court, on December 10, 1984. The Chapter 11 proceeding included, in part, the assignment by the debtor, to preserve to his estate and to the assignee, his

claimed interest in real property which had previously been sold under execution and sheriffs sale to a third party on October 1, 1980 in Salt Lake County (the subject matter before the Trial Court on this appeal).

The Chapter 11 proceeding was filed by Maxfield to reorganize his affairs and because he was not prepared to go to trial on January 10, 1985, on the third trial setting in an already protracted litigation in Third District Court. The original action Maxfield filed against Defendants Rushtons, was contesting the validity of the sheriffs sale conducted by the State of Utah, on October 1, 1980 (R 2).

STATEMENT OF FACTS

The Statement of Facts as set forth by the Appellants is fragmentary and argumentative in nature. Third-Party Defendant and Co-Respondent State of Utah elects to make a statement of facts that it deems appropriate to this appeal and is more complete and accurate.

1. Rushtons purchased two pieces of property at a sheriff's sale on October 1, 1980. The two pieces of real property that were purchased are described as follows:

> 3020 West 2995 South
> West Valley City, Utah;

upon which there was a factual dispute as to posting, and;

> 616 North Colorado Street
> Salt Lake City, Utah

upon which there was no dispute as to posting. (See Amended Complaint: R 5, 6, and 7)

2. The Third Party Defendant/Respondent adopts by reference herein the Statement of Facts numbers 12 through 25 of the Defendant/Respondent Rushtons' statement of the case, pages 7 through 9.

3. Utah's Great Game Preserve, as a result of an assignment from Maxfield to this family-held corporation is the party/plaintiff, and represented by Attorney Charles Brown (R 268-271).

4. The Court denied Plaintiffs' Motion for Summary Judgment; denied the Defendants' Motion to Dismiss, on April 1, 1981 but at the same hearing granted Plaintiffs' Motion to Extend Rights of Redemption for six months beyond the conclusion of the litigation (R 62).

5. Plaintiffs' second request for Summary Judgment was heard by Judge Dee on September 25, 1984; said Motion was denied (R 215).

6. The case on Defendants' request, dated February 4 and 17, 1984, was set for trial on April 30, 1984, at 10:00 a.m. (R 82-89).

7. On a request of June 19, 1984, the case was set for trial on September 10, 1984 (R 90), and Defendant Rushtons' counsel, Mr. Nygaard, filed a Motion to Compel Answers and Production of Documents on September 5, 1984 (R 180).

8. Another delay occurred and a third trial setting was scheduled on September 25, 1984, for January 10 and 11, 1985 (R 215). Judge Dee denied another Motion for Summary Judgment by

Plaintiffs. Before the case could proceed to trial, the Plaintiff filed the Chapter 11 on December 10, 1984 (R 260).

9. Defendants filed a certificate of readiness for trial on November 18, 1986 (R 264-267), to which Plaintiff's objected and to which they filed responsive pleadings (R 268-271).

10. The State of Utah moved the Bankruptcy Court to lift the stay in that court and allow the State District Court trial to proceed. Judge John Allen ordered the matter should be tried in State Court where it commenced. (See Order dated February 25, 1987 (R 279-280)).

11. Third Party Defendants/Respondents State of Utah filed for immediate trial setting on February 25, 1987 (R 272-275). Plaintiff's counsel withdrew (R 285-6). Defendant Appellant's Rushton gave notice to Plaintiff to obtain substitute counsel on March 30, 1987 (R 289-290)

12. Defendant/Respondents Rushtons also requested an immediate trial setting on April 27, 1987 (R 291-293). Plaintiff personally, on May 18, 1987, filed an objection to a trial setting stating that he was not capable of handling the case (R 303-305). The District Court on June 1, 1987, set a trial date for September 15, 1987, pretrial on August 31, 1987, with the further proviso that all motions and discovery must be completed by August 17, 1987 (R 309, 310 and 311).

13. The Plaintiff filed objection to the trial setting on August 10, 1987 (R 332 335), and requested a continuance.

Both Defendants and Third Party Defendant/Respondent filed objections to Plaintiffs' request for a continuance dated August 11 and August 14, respectively (R 378 and 382).

14. Motions from all parties were heard on August 24, 1987 and the Court denied Plaintiffs' motion to dismiss claims against Plaintiff and denied Plaintiffs' motion to file a Third Amended Complaint, and also denied Third Party Defendant/Respondents' Motion for Summary Judgment (R 436). Plaintiffs' motion to continue the trial date had been previously denied (R 424).

15. The final pre-trial hearing was held on the 31st day of August, 1987. A lengthy pretrial conference was attended by the Plaintiff, his two attorneys, Mr. Charles Brown and Mr. Jeffrey Brown, Mr. Henry Nygaard representing the Rushtons, and Mr. Tanner and Mr. Schwendiman and Mr. McGee representing the State of Utah. Attorneys for Maxfield renewed their motion to file a Third Amended Party Complaint adding parties and changing the theory to a civil rights action, as well as their motion to continue the trial date. Judge Young denied said motions again at the pretrial conference. Attorneys Brown then stated that without the Third Amended Complaint and additional discovery, they were not prepared to go to trial on behalf of Plaintiffs and made a motion to withdraw as counsel (R 437, 438-448).

16. Plaintiffs' counsel also then told the Court that they had not been paid nor had they been able to reach an agreement as to their fee arrangement for the representation of

Maxfield and Utah's Great Game Preserve, assignees in interest (R 438-448).

17. Judge Young allowed Plaintiff Maxfield personally to speak for himself. Mr. Nygaard, Mr. Tanner and Mr. Schwendiman, responded. The Court was fully advised in the facts and legal theory of the case, and being so informed and so notified that Parties Plaintiffs were unprepared to commence trial on the firm date of September 15, 1987, dismissed the case for failure for the Plaintiffs to prosecute the same (R 437-438).

18. At pretrial, Plaintiff Maxfield made no representation that he was ready or willing to proceed to trial without counsel; paragraph 29 on page 9 of Appellants Statement of Facts is clearly erroneous, and no such representation was made by Plaintiff Mr. Maxfield.

19. The Third Party Defendant/Co-Respondent adopts by reference herein, the statement of Facts numbers 27, 28, and 29, from page 10 of Defendant/Respondent Rushtons' Statement Of The Case.

20. In reference to paragraphs 20 and 21 of Appellants Statement of Facts, Respondent, State of Utah, filed an addendum to their Third Party Complaint as against Maxfield (R 204-208) alleging fraud in the obtaining of the original deeds (R 204). Appellant never replied to the Third Party/Respondent State of Utahs' allegations as to fraud.

21. The trial judge dismissed the case on its merits after Plaintiff failed to prosecute it successfully after approximately seven years delay in time.

SUMMARY OF ARGUMENTS

POINT I: DISMISSAL FOR FAILURE TO PROSECUTE

This action was filed in October, 1980, as an action to set aside an execution sale. After initial motions and pleadings, Plaintiff took no action for the years 1982 and 1983. Defendants requested Trial settings in 1984, 1986, and 1987. State of Utah requested Trial settings in 1987. Four Trial settings had been set, Appellants not being ready to proceed at any of the settings, continuously seeking more time. No action was taken for the years 1985 and 1986. It was Defendants and State of Utah pushing for Trial - Appellants acknowledged not being ready to proceed after seven years. The court did not abuse its discretion.

POINT II: NO ERROR IN DENYING SUMMARY JUDGMENT

The placing of the conveyance in issue as based on fraud with accompanying affidavit and the premature nature of the Motion before an Answer had been filed and before discovery was complete was sufficient reason to deny Appellants Motion For Summary Judgment. Parties against whom Summary Judgment is sought have a right to inference in their favor - which was appropriate in this case.

POINT III: ORDER ALLOWING REDEMPTION

The courts order of redemption was effective as to Appellant for any right that he can establish that he has. That right of redemption began to run on August 31, 1987, The date

Judge Young dismissed the matter for failure to prosecute. There is no basis to overturn the court's ruling.

POINT IV: PRIORITY OF APPELLANTS UNRECORDED **DEEDS** OVER **JUDGMENT:**

Both Defendants Rushtons and the State of Utah alleged fraud in the transfer of deeds to Appellant Maxfield. This has been an issue as to Appellant's claim since 1981. This, therefore, became an issue of fact to be determined by the Trial Court.

The courts dismissal of Appellant's case for failure to prosecute extinguished this issue, along with other issues of fact. As such, the issue was raised by Appellant to this court is improperly before the court, since there has been no determination as to Appellant's interest in the property.

ARGUMENT

POINT I

THE COURT ACTED APPROPRIATELY IN DISMISSING THIS ACTION WHEN APPELLANTS WERE NOT READY TO PROCEED TO TRIAL AFTER SEVEN YEARS. IN SO DOING, THE COURT DID NOT ABUSE ITS DISCRETION

Counsel for Appellants urges this court to believe that the Trial Court arbitrarily and without basis in fact dismissed a matter that should not have been dismissed. This not only distorts the true picture, but is a simplistic misrepresentation of the record. As the State has pointed out in its statement of facts and as will be emphasized throughout this argument, this matter has been pending for seven years. During that seven years there have been four trial settings (R 89, 90, 215, 309), the latest being in September 1987 when, Appellants and their counsel told the court they were not ready to proceed. The injustice caused to bona fide purchasers of property through Appellants' failure to prosecute the matter, after such an extended period, was and continues to be highly prejudicial and damaging to Defendants and Third Party Defendants State of Utah. Such a delay and unpreparedness is without excuse. The court acted properly when it dismissed the case.

In their brief, Appellants aver that it was inappropriate for the Trial Court to dismiss the action on its own motion. This statement is made amidst partial fact as

presented in their argument. This court has specifically held that courts on their own motion can dismiss actions that justify dismissal. In the case of Brasher Motor and Finance Company v. Brown, 23 Utah 2d 247, 461 P.2d 464 (Utah 1969) the Court dismissed an action that had been pending for 5½ years. On appeal it was argued that the sua sponte dismissal was inappropriate. The court said:

> In our opinion, the trial court in urging a plague on both of the litigants' houses by its sua sponte action, made a gesture that, if employed by more judges, could aid in the elimination of backlogs, and help to restore that loss of public confidence in the judiciary engendered thereby.

The court acknowledged that it was adopting the position of the Oregon Supreme Court as espoused in the case of Reed v. First National Bank, 194 Or. 45, 241 P.2d 109 (Or. 1952) where the court specifically found that the lower courts had authority "on its own motion" to dismiss matters and that those decisions would not be disturbed unless the court abused its discretion.

This court has consistently maintained that position. In Wilson v. Lambert, 613 P.2d 765 (Utah 1980) the court stated "indeed, the court retains inherent power to dismiss an action for failure to prosecute pursuant to its own motion." Later in K.L.C. Incorporated v. McLean, 656 P.2d 986 (Utah 1982) the court once again reaffirmed this holding.

Counsel for the state have reviewed cases decided by the Utah Supreme Court in analyzing the applicability of a

court's usage of dismissal for failure to prosecute. Among other things, this court relies heavily on the "record" of what has happened in the case to the point of the dismissal. A determination must also be made as to the action/inaction, preparation/non preparation of each party to the action.

The five criteria against which any matter is judged was set forth in Utah Oil Company v. Harris, 565 P.2d 1135 (Utah 1977). They are as follows:

1. The conduct of both parties.

2. The opportunity each has had to move the case forward.

3. What each of the parties have done to move the case forward.

4. What difficulty or prejudice may have been caused to the other side.

5. And, most important, whether injustice may result from the dismissal.

At the center of each of these criteria is the analysis of the factual setting. This court, for example, held against several defendants because they also had an obligation to move the cases forward and did not do so. Such was the case in Wright v. Howe, 150 P 956 (Utah 1915), Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977), and Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980).

The record of the instant case, however, clearly establishes that the Defendants Rushtons and the Third Party Defendant, State of Utah, have with regularity made effort to move the matter to trial, only to be delayed by the Appellants.

After two two-year delays of no action on the part of Appellant (91982-1983, 1985-1986). Defendants requested trial settings in February 1984 (R 82-87), November 1986 (R 264-267), and April 1987 (R 291-293). Third Party Defendant, State of Utah, also sought immediate trial settings in Bankruptcy Court in January, 1987 (R 368-371) and in State District Court in February, 1987 (R 272-275). Both Defendants and Third Party Defendants were prepared on each occasion to proceed to trial, only to be stopped by Appellants who were not ready.

The record is void of any effort or attempt of Appellants to seek any trial setting. There appears a series of objections to trial settings (R 268-271) (R 303-305), motions for continuance (R 355-358), bankruptcy stays (R 260-263), etc. All of these were Appellant initiated delays. Appellants took no action in 1982 or 1983, and did nothing to push forward the claim in 1985 and 1986 when the matter was in Bankruptcy. After Defendants sought a trial setting in 1984 (R 89), which was ultimately scheduled for April 30, 1984, Appellant Maxfield sought more time for discovery. A second trial setting of September 10, 1984 (R 90) was also continued because Appellant had not yet completed his discovery. Defendants Rushtons even had to file a Motion to compel Appellant to answer their Interrogatories (R 180-182). Appellant Maxfield delayed and took depositions until after the scheduled trial date in September, 1984.

A third trial setting was set for January 10-11, 1985 (R 215), before Judge Dee, but just three weeks before that date, Appellant Maxfield filed bankruptcy proceedings which in effect stayed the proceedings in State Court and vacated the trial setting (R 260-263). Appellant Maxfield did nothing in Bankruptcy Court to pursue his claim against either Defendant, yet assigned whatever claimed interest he had to Utah's Great Game Preserve, a family held company. Defendants Rushtons were so frustrated in the delays and lack of activity on the part of Appellants and the length of time that had passed that they filed a readiness for trial in November 1986 in the State District Court (R 264-467), and even though the matter was still in Bankruptcy, Plaintiff's counsel filed a written objections with the court on November 28, 1986 (R 268-271) stating that he had not had time to familiarize himself with the case (even though he had been involved in the Bankruptcy since at least March, 1986, and had attended a settlement discussion with counsel for Defendants and the State in June of 1986). He had discovery to do (which he waited a year to do) (R 316) and that he had no financial agreement with Plaintiff (which was the case when he filed his request for withdrawal in August, 1987 (R 438-448)). It wasn't until the State of Utah filed a request in Bankruptcy Court on January 2, 1987, which was later amended (R 368-371) for permission to proceed to trial that Judge John Allen ruled that there was no stay and that the Appellants should proceed in state court (R 279-280). Said ruling came on February 25, 1987, after

which the state, that same day, filed a request for immediate trial setting in state court (R 272-274).

Even then, it was the State of Utah and Defendants Rushton who moved for trial (R 272-274), when they filed their request for trial setting on April 27, 1987 (R 291-293), not Appellants. Instead of seeking to move the matter along, Appellants filed another "Objection to Hearing on Motion for Immediate Trial Date And Other Motions now Pending" on May 18, 1987 (R 303-305). Therein Appellant Maxfield stated that he was not capable of handling the matter by himself - that he needed the aid of an attorney (his previous attorney had withdrawn (R 285-286, 306-307) and Defendants had given him notice to obtain a new one (R 289-290)).

The Court rejected Appellants' objection, and at a scheduling Conference on June 1, 1987, set a September 15, 1987 Trial date as a firm date with all discovery and motions to be cut off on August 17, 1987 (R 308-315). Immediately prior to the cutoff date, Appellants moved for continuance of the trial date to yet do more discovery (R 337-334, 355-358). At the final trial and pretrial conference, counsel for Plaintiff stated they were not ready to proceed to trial and withdrew as counsel. At the pre-trial, Appellant Maxfield personally spoke to the issues and did not in any way indicate to the court that he was ready or that he wanted to move ahead without counsel.

The Appellant's submission of an affidavit to this court six months later saying that he was ready to proceed

without legal counsel is self-serving, not part of the record and was not made known to the lower court, even when Appellant Maxfield, through his former counsel, objected to the proposed Order of dismissal and through new counsel Edwin Guyon orally argued the Objection (R 458-459, 470). This court has long held that issues not raised in the lower court cannot be raised for the first time on appeal. This attempt to circumvent his lack of action at the time the court made its ruling must be rejected. A similar attempt was summarily rejected by this court in Maxfield v. Fishler, 538 P.2d 1323 (Utah 1975). In that case, Plaintiffs appeared for trial without an expert witness and ill prepared to proceed to trial after only two years. The Court dismissed the matter for failure to prepare and prosecute the claim with reasonable diligence. On appeal, the Plaintiff's counsel stated that he "could have proceeded" using the parents only and without an expert. The Court rejected this self serving statement in the following terms: "The record does not show that a request to so proceed was ever made." In the instant case, the record is also void of any such request since it was never made. The court was well within its powers and sense of justice to the Defendants to dismiss this matter after seven years and four trial settings when the Appellants (who had known since June 1, 1987) knew that trial was set. Instead of preparing, they wanted another continuance and were not ready to proceed.

This court in the case of Thompson Ditch Company v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (Utah 1973) upheld the

dismissal of an action filed in 1964 for failure to prosecute when, after 8 years the matter had not been resolved and settlement discussions had not resolved the issues. This Court was clear that the entire "record" needed to be surveyed to see what the circumstances were. The court found that Plaintiff had not been misled by Defendants and that the record established that after the length of time in question, the Plaintiff had been dilatory in his responsibility to move the matter forward.

A complete review of the record will reflect that other than the initial actions in the fall of 1980 and spring/summer of 1981, Appellants have always basically sat back doing little other than "reacting" to the Defendants attempts to get the case tried. It is true that Appellant Maxfield filed for Summary Judgment in the summer of 1984 (R 91-92) and that some discovery was done later that year (R 142-150, 198, 203). Appellant then let the matter sit for almost three more years. It was Defendants and Third Party Defendants that kept pushing the matter to a firm trial date through and including September 1987.

The State of Utah is perplexed that Appellants now assert that they somehow were "active" on the case when the entire record shows they were not prepared and basically fought a resolution. The State of Utah was ready and pushing for trial in April 1984 (R 82, 89), September 1984 (R 90), and January 1985 (R 215). Then, the State along with the other Defendants were pushing since February, 1987 (R 368-371, 272-275, 291-3) and ready to try this case in September 1987. Throughout this entire

process, Appellants have never been ready to try this matter, even attempting to change the theory of the case after seven years by filing a motion to amend one month before trial and by requesting a second time at pretrial the court's permission to file a Third Amended Complaint (R 404-421). The Court rejected this attempt to amend once again (after such a lengthy amount of time had passed) and held the Appellants to proceed on the earlier pleadings (R 436). Even at that, Appellants weren't ready to proceed to trial on the earlier pleadings though three previous trial settings had been set and the fourth one was known over three months before the final pretrial conference where Appellants and their counsel admitted lack of preparedness.

The case of Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975) helps to focus attention on that which is important in the instant case. In that case, the Court reversed a dismissal for failure to prosecute, because the Plaintiff made a reasonable effort and compliance within a three year period.

The Court looked at the conduct of both parties and found that there was a reasonable excuse and unusual circumstances that justified the behavior of the plaintiff. The court held that the Trial Judge therefore abused his discretion in that the totality of the circumstances did not justify the decision. The court pointed out, that while the Plaintiff was not overly faultless at his lack of activity, the Defendant had allowed the matter to lie dormant and was not anxious to move the matter forward. That is certainly not the case here.

This court acknowledged in Westinghouse that reasonable latitude and discretion is to be afforded the trial court. The length of time, while not being the sole determiner of the court's actions, must be coupled with such activities that would warrant a dismissal. In Utah Oil Company, the Court looked at the "reasonably excusable" activities of the Plaintiff in determining that a sixteen month delay was not sufficient.

Appellant Maxfield, in the instant case, has no reasonable explanation, other than a trail of former attorneys that he has not been able to work with (R 285-286, 438-448, Supreme Court file containing withdrawal of Guyon), broken promises to those attorneys, numerous avenues of delay without any clear objective of what he wants as far as a course of direction for the litigation as is evidenced by the Withdrawal Affidavit and Motion that was filed by two of his counsel at the Pre-trial in August 1987 (R 438-448). It is not the Defendant Rushtons, nor the State of Utah's fault that Appellants are is in the position they are in.

As one looks at the criteria set forth in Utah Oil, the bona fide purchasers have been tremendously harmed, prejudiced and continue to be held hostage to a Plaintiff that now claims he was prepared, but has not shown in seven years that he is ready to go to trial - even when he is on notice of when the trial is scheduled. The State has likewise found it difficult to find witnesses, several of them having moved out of state, and others whose purpose is to support the defense of fraudulent and/or non-

valid transfers of the deeds in question, because of the countless delays created by Plaintiff. Yet, the State pushed to move forward, because this matter must come to an end some time. It is certainly prejudicial and harmful to the State in its ability to challenge the validity of the deed transfer and every aspect of this matter due to the dilatory tactics and actions of Appellants.

Defendants, likewise, have been in possession of the properties and have had to repair, rent, pay taxes, etc. on the properties for these seven years with only a counterclaim against Plaintiff to show for all of the money and effort they have placed in the property. At some point of time the matter has to end. Appellants, by the record, have never been ready to resolve the matter. The record is also clear that so much money has been placed in the properties by the Defendants, that at this point of time, even if Appellants would win at trial, the offsets under the counterclaim would be so great that there would little or no recovery by them; all of this because Appellants have not proceeded with diligence.

Several of the cases previously cited by the State in this Brief, have factual situations that are less compelling than the current case, yet the court sustained their dismissals. In Maxfield a complaint was filed in 1972 and depositions were taken in 1973. The Defendant in that case requested a trial setting. Plaintiff objected to the trial request. Plaintiff further did not submit answers to Interrogatories until after a motion to

compel and five days before trial . The Plaintiff knew months before of the trial setting, yet asked for a continuance immediately prior to trial. This was denied. The attorney for Plaintiff then admitted that they did not have an expert for trial. The matter was dismissed. The only issue that seemed to give this Court trouble was that an expert witness was not absolutely necessary for the trial to proceed, even though it was clear that they were not prepared.

In Wilson, the Court recognized that the Plaintiff had ample notice of trial setting and his unpreparedness after a series of other events justified the dismissal. A Complaint had been filed in 1968 with little or no action until 1973. Trial was set for 1973 and postponed because of illness of the attorney. Trial was next set for 1977 with plaintiff moving to vacate the trial setting. The Court issued an Order To Show Cause for failure to Prosecute. The Court did not dismiss, but set for trial setting a third time. Nine months later, the Court dismissed the matter because Plaintiff was on notice of the trial schedule and was not prepared to proceed.

A similar case to the present circumstances was in K.L.C. where the action was filed in 1967 and after a failed Motion to Dismiss, a counterclaim was filed and the matter set for trial the following year. Summary Judgment was denied, counsel withdrew and a new trial setting was established for 1968. There was no action for several years. A third trial date was set for 1976 which was delayed for further discovery. A

fourth trial setting was established and the Plaintiff moved for dismissal on his claim and against Defendant for failing to prosecute his counterclaim. The court agreed stating that the facts of that case justified the dismissal.

Each of the three above cited cases, as well as other cases herein point out that: (1) there were several trial settings where the moving parties should have been prepared; (2) there were periods of time where no action had taken place on the case; (3) extended periods of time had gone by from the filing of the case until the dismissal; (4) the parties were on notice of the trial dates and scheduling and therefore had no excuse for not being ready to proceed; (5) the parties against whom the dismissal was made really had no justifiable reason for not being ready; (6) The parties against whom the dismissal was made claimed at some point of time that they wanted to proceed, several even filing motions for continuance before the scheduled trial setting; (7) the withdrawal of counsel at some point of time in the process did not relieve the moving party from the obligation of moving forward.

While these seven points are somewhat different from the criteria set forth by this court to analyze such situations, they do point out some common threads that this case has with these, where dismissals were upheld. When viewed as a whole, comparing both the circumstances of the previous cases with the current case, Judge Young not only appropriately, but with reasoned discretion dismissed the case. The Judge was familiar

with the 4-5 inch thick file, had reviewed what had taken place, listened to the parties, hearing from Plaintiff personally, and realized that Defendants Rushtons and the State had been and were once again ready to proceed and the Plaintiff was not. After seven years and sufficient notice, the action the court took was appropriate and justified.

In looking at the common threads as delineated above, there were; (1) four trial settings in this matter, most of which were either continued or postponed because of the actions of Appellants (R 89, 90, 215, 309); (2) there was no or little action for the years 1982, 1983 (R 81-82), 1985 and 1986 (R 255-264), except for what Defendants had engaged in which was objected to by Plaintiff; (3) the case extended from October 1980 through September 1987 at which time the Appellants were still unprepared to go to trial, still seeking more continuances (R 355-358), discovery (R 355-358), and seeking to amend the complaint for the third time (R 404-421, 436); (4) Plaintiff had been on notice since February, 1987 that both Defendants Rushtons and the State of Utah wanted and were seeking immediate trial settings. The case had gone on long enough and they wanted it to proceed. Appellant Maxfield even objected to these requests (R 309). On June 1, 1987, Appellants were on notice once again that trial would be held. This time, in a <u>firm first place trial setting</u> for September 15-16, 1987 (R 309), 3½ months in the future. Cutoff dates for all motions and discovery were set at that time (R 309). When those deadlines came, Appellants still

sought more time and a continuance of trial date (R 355-358); (5) Appellant Maxfield offered no excuse for not being ready, other than they didn't like the work of his attorneys who asked to withdraw because Appellant had misled them, had not entered into agreements with them relative to fees, and was displeased with their performance (R 438-448). This action on the part of Appellant Maxfield two weeks before trial certainly should not be used to create further injustice to the bona fide purchasers of the property who would be further damaged by this inexcusable behavior on the part of Appellant with his counsel; (6) Appellant Maxfield contends now that he wanted to proceed and would have had he been given an opportunity, yet the record is silent and Appellant never did make such a request. His own counsel said that he was not ready to proceed, and Appellant had written in May, 1987 that he could not proceed without counsel because he was not capable of doing so (R 303-305), and; (7) there had been withdrawal of counsel on two occasions which had nothing to do with Defendants Rushtons or the State (R 285-286, 438-443). This was a matter between Plaintiff and his attorneys.

On one occasion, this Court overturned a dismissal for failure to prosecute because the Trial Court had itself misled the parties because of failing to notify the parties of a trial date. See Polk v. Ivers, 561 P.2d 1075 (Utah 1977). In Thompson Ditch, the Court found that the Plaintiff had not been misled by the Defendant in settlement negotiations and therefore could not use that for an excuse as to his inaction. In the present case,

there is no evidence either that the Court or Defendants Rushton or the State of Utah misled Appellant. After seven years, with a known trial date set at which the case was scheduled to "go" and which was being pushed by both Defendants and Third Party Defendants, Appellants simply were not ready and didn't even know what theories they wanted to push. Even his attorneys did not want to go to trial on the issues then before the Court (R 438-448). (Emphasis ours)

Based on the foregoing, Third Party Defendant, State of Utah urges this court to recognize the lack of attention and failure to pursue his claim that is so obvious. Certainly, the Trial Judge, having been familiar with the record, acted in a responsible manner as was encouraged by this Court in Brasher.

Counsel has not been able to find a clear definition by the Utah Supreme Court of what constitutes "abuse of discretion" as might be applicable to this case. That is the standard that this court has set forth in such a review. Many jurisdictions, however, have grappled with this concept. The Michigan Appeals Court in People v. Wolschon, 2 Mich.App. 186, 139 N.W.2d 123 (Mich.App. 1966) stated:

> The term discretion itself involves the idea of choice, of our exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason, but rather of passion or bias. (Emphasis added)

The Wyoming Supreme Court added a further clarification in Waldrop v. Weaver, 702 P.2d 1291 (Wyo. 1985) wherein the court said: "An abuse of discretion is that which shocks the conscience of the Court and appears so unfair and inequitable that a reasonable person could not abide it." (Emphasis added). This position was also accepted by the Louisiana Appellate Court in Schueler v. Schueler, 460 So.2d 1120 (La.App. 2 Cir. 1984) when it held that: "Abuse of discretion is defined as such abuse as shocks the conscience of the court. It must appear so unfair and unequitable that reasonable persons could not abide it." (Emphasis added).

Counsel for Third Party Defendant, State of Utah, was able to locate a case from the Ohio Court of Appeals that dealt with interpreting "abuse of discretion" in terms of a dismissal for failure to prosecute a case. In that case, Schreiner v. Karson, 52 Ohio App.2d 219, 369 N.E.2d 800 (Ohio App. 1977), the court sua sponte dismissed an action. While recognizing that such actions are severe and that the facts must warrant the action, the court stated that "An abuse of discretion implies an unreasonable, arbitrary or unconscionable attitude by the court."

This guideline needs further clarification. This Court in Ostler v. Industrial Commission of Utah, 84 Utah 428, 36 P.2d 95 (Utah 1934) stated:

> It would seem the words "arbitrarily" and "capriciously" are used merely to characterize a conclusion, when the conclusion is announced with no substantial evidence to support it or a conclusion contrary to substantial competent evidence.

The Wyoming Supreme Court in In Re West Laramie, 457 P.2d 498 (Wyo 1969) held that "arbitrary" meant "willful and unreasoning action, without consideration and regard for the facts and circumstances presented, and without adequate determining principle." The Court of Appeals for Kentucky in Thurman v. Meridian Mutual Insurance Company, 345 S.W.2d 635 (Ky 1961) stated that:

> By "arbitrary" we mean clearly erroneous, and by "clearly erroneous" we mean unsupported by substantial evidence. By "unreasonable" is meant that under the evidence presented there is no room for difference of opinion among reasonable minds.

The Nebraska Supreme Court in Redding v. Gibbs, 203 Neb. 727, 280 N.W.2d 53 (Neb 1979) stated:

> . . . In **Domus [Domus Realty Corp. v. 3440 Realty Co., Inc.,** 40 N.Y.S.2d 69 (1943)] the court defined the terms "oppressive" and " unconscionable" as follows: "Tested by ordinary definition and by common understanding, 'oppressive' means conduct that is unjustly burdensome, harsh or merciless and 'unconscionable' means conduct that is monstrously harsh, that is shocking to the conscience." (Emphasis added).

From the above definitions of "arbitrary," "unreasonable," and "unconscionable" it is clear that Appellants have not met their burden. Certainly, the record shows the attention paid by Defendants Rushton and Third Party Defendant, State of Utah and the inaction and delay on the part of Appellant. Judge Young had a record replete with information from which to make a rational, reasoned decision that the Appellants had failed in their obligation to carry the matter forward to conclusion.

Appellants cite only a narrow selective part of the record to argue that the Court abused its discretion. Their argument is hollow and unpersuasive when the "entire" record is reviewed. The State has attempted to point out what Judge Young had before him. Appellants have cited nothing that comes close to meeting the burden of establishing that the action "shocks the conscience" or is "palpably and/or grossly violative of fact and logic;" that is arbitrary, unreasonable, unconscionable, or with which a "reasonable person" would not agree. The facts as presented above and as are found in the 7 year record are clear and straight forward. The Defendants Rushtons and the Third Party Defendant State of Utah, have been ready and pushing for the matter to be heard. They have resisted continuances (R 378-379, 430-435) and further amendments that would have delayed this matter further. Plaintiff/Appellant was not ready to try the case, had no valid excuse, and was simply dilatory in his actions.

As this Court amply stated in Thompson Ditch, the entire record must be surveyed to determine whether there is a basis on which to sustain the lower court. Such a survey reveals reasonable, logical and judicious exercise of the inherent powers of the court. The actions of the Lower Court should be sustained and this matter ended. No injustice will result by sustaining the lower court. The bona fide purchasers will finally be able to take what has been theirs for seven years.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Third District Court's denial of Appellants Motion for Summary Judgment on the 27th day of March, 1981 by Judge James Sawaya and the subsequent denial of the filing of a third amended complaint, as part of this record, sustain further the rightfulness of the dismissal by Judge Young of this action in chief, for failure to prosecute. Jenkins v. Toone, 27 Utah 2d 17, 492 P.2d 980 (1972) held that validity of deeds created an issue of fact which precluded summary judgment.

Rulings on motions for summary judgment are not reversed by the Appellate Court unless there is clearly an abuse of discretion or the trial court is in error as a matter of law. The burden is upon the moving party, and the defending party is given the benefit of every doubt in order to ensure that parties, if legally deserving, shall have their day in court.

The Appellant argued that the first Motion for Summary Judgment filed before an answer had been filed or any discovery had taken place was error as a matter of law. The Defendants Rushtons were only aware that they were innocent purchasers of real property being sold by the Sheriff of Salt Lake County to enforce a judgment.

On March 27, 1981, the Court heard arguments on Defendant Rushtons' Motions to Dismiss and Plaintiffs' Motion for Summary Judgment. The Court denied the Motion for Summary

Judgment upon the grounds that it was premature (R 52). The Plaintiff filed an Intermediate Appeal (R 104-106). The Intermediate Appeal was denied.

The Plaintiff/Appellant argues that the Affidavit filed by Rushtons' counsel does not adequately raise questions of law of fact to successfully challenge the Plaintiffs' Motion for Summary Judgement. This argument was denied by the trial court because the State of Utah had not been joined a necessary party, the Defendants Rushtons were innocent bona fide third-party purchasers under a sheriff's sale, and that the relationship between Maxfield and Romero raised a question as to the validity of the deed from Romero to Golden Circle Investment Corp., to Maxfield.

Secondly, there had been inadequate time to complete discovery.

Next, Third-Party Defendants/Respondent State of Utah, should have adequate time to file an answer to raise the legal issues of fraud, joinder and the validity of the purported deeds of conveyance.

The Court's denial of the Motion for Summary Judgment based upon the above rationale is fully supported by prior decisions of the Utah Supreme Court.

The Defendants were entitled to have all the evidence and inferences construed in their favor. In Bower v. Riverton City, 656 P.2d 434 (1982), the Supreme Court stated at page 436:

> If there is any doubt of uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all of the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the opposing summary judgment.

The Supreme Court has furthermore declared that an Affidavit is not even essential to successfully contest a Motion for Summary Judgment. Under Rule 56(c) U.R.C.P.:

> The adverse party prior to the day of hearing may serve opposing affidavits, but is not required to do so. He may stand upon his pleadings providing his allegations, if proved, would establish a basis for recovery. [Christensen v. Financial Service Co., Inc., 337 P.2d 1010 (1963).]

The Defendants Rushtons' Answer, Counterclaim, and Third-Party Complaint joining the State of Utah were filed immediately after the Plaintiffs' Motion for Summary Judgment was denied, specifically pleading the issues with particularity as generally set forth in Defendants Rushtons' and the State of Utahs' subsequent motions and pleadings and have fully established the existence of genuine issues between the Appellants and Defendants.

Judge Sawaya properly denied the Motion for Summary Judgment as the pleadings clearly set forth the question as to title on the part of Appellant Maxfield, and the Appellants have wholly failed throughout this protracted litigation to prove their title and/or interest and were not prepared to do so on August 31, 1987, and Judge Young, based on the record and the representations at pre-trial, acted properly in dismissing the action.

POINT III

THE TRIAL COURT DID NOT ERR IN FAILING TO ISSUE AN ORDER ALLOWING THE RIGHT OF REDEMPTION IN THE PLAINTIFF

Judge Sawaya's Order of March 27, 1981, preserved to Appellant any right of redemption he may have in himself or through the original conveyor, Lester Romero or any of the alleged invalid corporate entities or partnerships through which Maxfield claims his chain of title. That right of redemption to Appellant was granted until the end of February, 1988 as a result of the Order of Judge Young dated September 30, 1987 (R 449).

Under Rule 69(f)(1), U.R.C.P., those who can redeem are limited to:

a) Judgment debtor;

b) A creditor having a lien by judgment or mortgage on the property sold, on or some share or part thereof, subsequent to that on which the property was sold.

Argument III, on pp. 14-16 of Appellants' Brief clearly misstates the facts and the law relative to redemption, and the Order of Dismissal by Judge Young on August 31, 1987 clearly sets forth that the right of redemption would run from that time forward.

On November 30, 1984, Appellants' Motion relating to rights of redemption was argued and the Court reserved ruling until date of trial (R 230).

On December 10, 1984, the Plaintiff filed a petition in bankruptcy, thereby staying further proceedings (R 260).

Under these facts and circumstances, there is not a factual or legal basis for reversing the trial court's denial of the Appellants Motion for Summary Judgment, or its decision on the issue of the extension of the right of redemption.

Appellants' contention that the failure of Judge David Dee to rule early precluded Maxfield's ability to so redeem is without merit. Third-Party Defendant and Co-Respondent State of Utah have clearly taken the position throughout the length of this protracted litigation that the right of redemption existed and that the Order of Judge Sawaya granted said extended right and that said right has existed all along until six months from August 31, 1987.

POINT IV

THE VALIDITY OF APPELLANT'S DEEDS/TRANSFER WAS NEVER ADJUDICATED IN THE LOWER COURT AND THE ISSUE OF THEIR STATUS IN RELATIONSHIP TO THE STATE'S LIEN IS THEREFORE IMPROPERLY BEFORE THIS COURT

Appellants raise in argument a claim that their unrecorded deeds took priority over the judgment obtained by the State of Utah when the property was in the name of Lester R. Romero, the Defendant in the welfare fraud trial that led to the judgment from which the execution took place. To support their abbreviated and unconvincing argument, Appellants misstate the record and cite no authority on point to support their position.

Even assuming Appellants properly argued such a claim, it is improperly before this court since there has never been an

adjudication on the validity of the deeds Appellants rely on. The validity of the deeds in question and the precarious nature of Appellant Maxfield's relationship with Mr. Romero was placed in issue when Defendants Rushton filed their answer in April, 1981 (R 53-56). This was also the subject of discovery on the part of the Defendants and the Third Party Defendant State of Utah, and was heavily pled when Defendants amended their Answer in August 1984 (R 183-188) and when Third Party Defendants also clarified the Third Party Complaint in September, 1984 (R 204-208). The State of Utah and Defendants also maintained this factual defense as part of the answer to the second amended complaint that both filed (R 328-329, 390-394).

The transfer and validity of the deeds in possession of Appellants has never been determined in Appellants' favor. This was an issue that was maintained by the Defendants and Third Party Defendant and pushed by them for inclusion in the defense of this action at trial. The only list of witnesses submitted to the court, as per the Court's request, was a list of witnesses submitted by the State of Utah (R 425-427). The bulk of those witnesses were for the purpose of establishing the improper conveyance and invalidity of the deeds upon which the Appellants rely.

Because this was an issue to be tried, not only was the court proper in denying any summary judgment that was argued regarding it (R 52, 215), but Appellant's failure to prosecute the case brought to an end his claim under this issue since the

court dismissed Appellants' action. The Appellants have no legitimate issue to appeal. The lower court dismissed all of Appellants' claims. The lower court's actions preclude Appellants from trying the issues before This court. The only legitimate issue for appeal is the court's dismissal for failure to prosecute. Since the court acted appropriately, responsibly and with sound judgment, Appellants have no further claim in this regard.

This court should not render an advisory opinion which is exactly what Appellants are seeking. They are requesting this court to ignore the contested issue of the transfer and validity of the deeds, assume all is valid, and award judgment in their favor without the Defendants having an opportunity of presenting their evidence to disputed his claim of valid ownership.

In Defendants Rushtons' Motion to Dismiss dated December 19, 1980, Defendants state in specific terms that Appellant ". . . Reed Maxfield must establish his relationship with Lester Romero . . ." (R 8-10). When the preliminary motions were denied and disposed of, Defendants were required to file an answer which they did on April 2, 1981 alleging that Plaintiff/Appellant is not only estopped from his assertion because of his fraudulent activity with Lester Romero, but that:

> Defendants specifically allege that Maxfield at no time had any rightful interest in and to the said property, and that dealings between Romero and Maxfield were fraudulent in nature as a means of trying to prevent the State of Utah from knowing that Lester Romero was the true and correct fee title owner of said property. (Emphasis added) (R 53-56).

The court is reminded that at the time Defendants filed their answer placing both the validity and transfer of the deeds in issue, the State of Utah was not a party to this action and had not been involved with any of the hearings or motions. It was only through a Third Party Complaint that Defendants, not Appellant, filed against the State that brought the state in as a party, albeit a Third Party Defendant (R 57-58). This was the posture of the case through two trial settings (R 89, 90) and into a Third setting (R 215). Appellant Maxfield's attorney filed a motion for permission to file a Second Amended Complaint in December, 1984 (R 251-254), approximately three weeks before the trial was to begin. At the same time he filed a Bankruptcy matter which stayed all proceedings (R 258-263).

This was over four years from the date of the sale (R 10-11) and named the State of Utah and others for the first time as Defendants well beyond the statute of limitations. A hearing on Appellant's request to proceed on the Second Amended Complaint was not heard for quite some time after which both the State of Utah and Defendants were ordered to answer (R 308-314). Both the State's and Defendants' answers to the Second Amended Complaint placed ownership of the property in question (R 322-329, 390-394).

The dismissal for failure to prosecute the case ended Appellant's claim that he had a superior interest in the property to that of the State of Utah. Appellants were on notice since 1981 that Maxfield's claimed ownership was being contested (R 53-

56). Instead of prosecuting that claim, and being prepared for trial after seven years and four trial settings, Appellants now want this court to intercede and rule in their favor as a matter of law when it is an issue of fact they have never been ready to defend. For this Court to honor their request would be both improper and prejudicial to the State of Utah and Defendants who have always maintained that Maxfield's interest is both tainted and improper.

For some reason, Appellants single this issue out for a ruling when it is no different from the other factual issues that were to go to trial on four different occasions - none of which Appellants were apparently ready for. It is, for example in no different position than Appellants' claim that the properties were not properly posted for execution, even though the Salt Lake County Sheriff filed an affidavit that they were (R 23-23A). These are factual issues that the Trial Court would need to take evidence on before a ruling could be rendered. Since there was no trial, since the Appellants were not ready to proceed, and since the Trial Court properly found that Appellants had not prosecuted the case with diligence, the case with all attendant factual claims was properly dismissed.

Counsel for the State of Utah have not been able to find any cases exactly the same as that presented here on appeal. Most cases, including those from Utah generally deal with simply a judgment debtor and judgment creditor. In this particular case, however, Maxfield claims ownership from deeds given him two (2)

months prior to a trial (R 94) (in which he testified on behalf of Romero) (R 116-121), not disclosing he owned the properties in question (R 116-121) and holding them unrecorded until five days after this Supreme Court ruled against the grantor of the deeds in his appeal from welfare fraud and nine months after judgment was obtained which attached to the property (R 100-103) (See Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980) issued March 20, 1980 - deeds recorded March 25, 1980). The properties were then sold to bona fide purchasers (Rushtons).

The New Mexico Supreme Court has addressed a somewhat similar fact situation in the case of Jeffers v. Doel, 99 N.M. 351, 658 P.2d 425 (N.M. 1982) wherein the court stated:

> [E]quitable principles require that the innocent purchaser should prevail over one who negligently fails to record a deed upon which he seeks to rely."

The Colorado Supreme Court has taken a similar position and has been consistent throughout the many years that it has dealt with this subject. That Court in People v. Burns, 435 P.2d 894 (Colo 1968) reaffirmed its position in the early case of Western Chemical Mfg. Co. v. McCaffrey, 47 Colo. 397, 107 P. 1081 (Colo. 1910) wherein the court held that no unrecorded deed can operate to defeat the right of a judgment creditor who obtained the lien against real property prior to the recording of the deed. This position has also been taken by the Texas Civil Appeals Court on numerous occasions as well. See TPEA No. 5 Credit Union v. Solis, 605 S.W.2d 381 (Tex.Civ.App. 1980), Eagle

Lumber Company v. Trainham, 365 S.W.2d 702 (Tex.Civ.App. 1963), and McDonald v. Powell Lumber, 243 S.W.2d 192 (Tex.Civ.App. 1951).

While the Utah Supreme Court, in Kartchner v. State Tax Commission, 4 Utah 2d 382, 294 P.2d 790 (Utah 1956), has given some indication that it might reach a different conclusion, the Court has never dealt with a situation such as the current one. The State of Utah and Defendants Rushtons allege that moneys Maxfield claims he paid were given to non-office holders of the companies in question, were paid to fictitious persons (for which no receipts have been produced, though promised in Maxfield's deposition of October 18, 1984), involved properties the subject of welfare fraud. He was involved with Romero to the extent of acting as a holder of unrecorded deeds given to him immediately prior to trial as against the properties in question (as an effort to keep it away from the State), yet not recorded until five days after this court affirmed the Welfare Fraud Judgment against Romero. Romero continued to collect rents after this purported property transfer until the properties were sold, when Maxfield suddenly appears to claim a superior interest. Certainly, Kartchner did not deal with either facts like these and particularly with a third party bona fide purchaser such as Rushtons.

The cases from our neighboring jurisdictions, cited above, while coming close to the situation presented here, set forth the best approach in handling those matters involving a

fact situation such as presented in this case. To allow otherwise encourages judgment debtors to "secretly" transfer properties prior to trial and have them recorded after they lose in years of appeals claiming they never had ownership at the time of judgment. Such a position is offensive to justice and fairness.

Nonetheless, Third Party Defendant, State of Utah, strongly states that even reaching this issue is not necessary. As has been stated, the propriety and validity of any deeds and their transfer to Appellant Maxfield were placed in issue in 1981 and have been continuously contested by the State of Utah and the Rushtons from the beginning of this action. What the law is in Utah or other jurisdictions is at this point of time irrelevant since this issue is not ripe for review by this court. The Appellants seek only to offset their dilatory and neglectful actions in failing to prosecute this matter to conclusion by requesting and expecting this Court to entertain the above discussed issue **sua sponte** and decide issues as a matter of law even though they have never been heard at trial.

In their Brief, Appellants cite little to support their view that this court should step in now. What they do state is misleading, since (1) fraudulent activities as it relates to the property in question has been raised against Appellant from the beginning of this action; (2) there is evidence in Appellant's own deposition and other discovery that consideration was not bona fide and was not even paid to the party who claimed

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DATED this 18 day of November, 1986.

BEASLIN, NYGAARD, COKE & VINCENT

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NOTICE TO ALL PARTIES

Any objections to the foregoing certification or any disagreement to any of the matters certified are to be filed in writing with the Court within ten days of the date hereof, served upon all parties, and noticed up for hearing upon the law and motion calendar.

The foregoing Certificate is to be used in the Third Judicial District Court as the Request for Trial Setting provided

TO THE DISTRICT COURT:

Henry S. Nygaard, attorney for defendants Owen A. Rushton and Carol Rushton, by his signature below hereby certifies that in his judgment this case is ready for trial and in support of such certification counsel represents to the Court as follows:

1. That all required pleadings have been filed and the case is at issue as to all parties.

2. That counsel has completed all discovery; that opposing counsel have had reasonable time to pursue discovery; and that all discovery of record has been completed.

3. That if medical testimony is contemplated or required, copies of all existing medical reports have been made available to all counsel or parties of record.

4. That there are no motions that have been filed which remain pending and upon which no disposition has been made.

5. That reasonable discussions to effect settlement have been purused by counsel and their clients but no settlement has been effected. (Such discussions are to be realistic in nature and not limited to an unresponded to offer. The duty to effectively negotiate lies with all parties.)

6. Jury trial is waived.

Counsel further hereby certifies that the following counsel or pro se parties of record were furnished with a copy of this certificate on the 19th day of November, 1986, whose last known addresses and telephone numbers are as follows:

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD,

Plaintiff,

vs.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Defendants.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

vs.

STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendants.

STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendants and Third Party Complainants,

vs.

REED MAXFIELD,

Plaintiff and Third Party Defendant.

CERTIFICATION OF READINESS OF TRIAL

Civil No. 80-8167

Judge K. Fox

Minute Book Form 103

County of Salt Lake - State of Utah FILMED

Reed Maxfield
Plaintiff

Owen A. Rushton
Defendant

CASE NO: C80-8167

Type of hearing: Div.____ Annul.____ Supp. Order____ OSC.____ Other____
Present: Pltf.____ Deft.____
P. Atty: Lorin Pace, ✓
D. Atty: Stephen Schwendiman, Henry Nygaard ✓
Sworn & Examined:
Pltf:____ Deft:____
Others:____

Summons____ Stipulation____
Waiver____ Publication____
☐ Default of Pltf/Deft Entered
Date: 9.25.84
Judge: David B. Dee
Clerk: Brad Willis
Reporter: Beth N. Denstaw
Bailiff: AEmmer / H. Wm. Sartor

ORDERS:

☐ Custody Evaluation Ordered ☐ Custody Awarded To ____
☐ Visitation Rights ____

☐ Pltf/Deft Awarded Support $____ x ____ = ____ Per Month
☐ Pltf/Deft Awarded Alimony $____ Per Month/Year ☐ Alimony Waived
☐ Payments to be made through the Clerk's Office:____

☐ Atty. fees to the ____ in the amount of ____ ☐ Deferred
☐ Home To: ____

☐ Furnishings To: ____ Automobile To: ____
☐ Each Party Awarded their Personal Property
☐ Pltf/Deft. to Maintain Debts and Obligations
☐ Pltf/Deft. to Maintain Insurance on Minor Children
☐ Restraining Order Entered Against ____
☐ Pltf/Deft. Granted Judgment for Arrearage in the Sum of $____
☐ 90-Day Waiting Period is Waived
☐ Divorce Granted To ____ As ____
☐ Decree To Become Final: ☐ Upon Entry ☐ 3-Month Interlocutory
☐ Former Name of ____ Is Restored

☐ Based on the failure of Deft to appear in response to an order of the court and on motion of Pltfs counsel, court orders ____ / ____ shall issue for Deft. ____
Returnable ____ Bail ____

☐ Based on written stipulation of respective counsel/motion of Plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.

☑ Based on ~~written stipulation~~ argument of respective counsel/motion of Plaintiff's counsel, court orders ____
The plaintiff's motion for summary judgment is denied.
Trial is set for January 10 and 11, 1985.

STATE OF UTAH)
) SS:
County of Salt Lake)

LINDA L. McGRATH, being duly sworn, says:

That she is employed in the offices of Beaslin, Nygaard, Coke & Vincent, attorneys for Owen A. and Carol Rushton herein; that she served the attached Motion to Compel Plaintiff to Answer Interrogatories and to Produce Documents upon the following individuals by placing a true and correct copy thereof in an envelope addressed to:

Lorin N. Pace
Pace, Klimt, Wunderli & Parsons
1200 University Club Building
136 East South Temple
Salt Lake City, UT 84111

Bernard Tanner
Steve Schwendiman
Assistants Attorney General
State Capital Building
Salt Lake City, UT 84141

and depositing the same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah on the 5th day of ~~August~~ September, 1984.

Linda L. McGrath
Linda L. McGrath

Subscribed and sworn to before me this 5th day of ~~August~~ September, 1984.

Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

1-22-91

The defendants, by and through their attorney, Henry S. Nygaard, of the law firm of Beaslin, Nygaard, Coke & Vincent, hereby moves the Court pursuant to Rule 37(a) 2 and 4 of the Utah Rules of Civil Procedure to answer the interrogatories submitted to the plaintiff and its counsel and the Request for Production of Documents that have been file for more than thirty (30) days.

The defendants further request, if appropriate, the court order the plaintiff to reimburse the defendants for costs and attorney's fees incurred.

DATED This 23rd day of August, 1984.

BEASLIN, NYGAARD, COKE & VINCENT

Henry S. Nygaard
Attorney for Defendants

HENRY S. NYGAARD, ESQ.
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Defendants
333 North 300 West
Salt Lake City, UT 84103
Telephone: 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

REED MAXFIELD, Plaintiff, vs. OWEN A. RUSHTON and CAROL RUSHTON, his wife, Defendants.	MOTION TO COMPEL PLAINTIFF TO ANSWER INTERROGATORIES AND TO PRODUCE DOCUMENTS
OWEN A. RUSHTON and CAROL RUSHTON, his wife, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendants.	Civil No. 80-8167
STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendant and Third Party Complaintant, vs. REED MAXFIELD, Plaintiff and Third Party Defendant.	

receiving copies of the documents in this case on May 22, 1981, from Henry Nygaard.

DATED this 29th day of May, 1981.

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

STATE OF UTAH)
) ss:
County of Salt Lake)

Stephen G. Schwendiman, being first duly sworn according to law, deposes and says: That he is the affiant herein; that he has read the foregoing affidavit and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein alleged upon information and belief; and as to those matters, he believes them to be ture.

STEPHEN G. SCHWENDIMAN

Subscribed and sworn to before me this 29th day of May, 1981.

Notary Public
Residing in Salt Lake County, Utah

My Commission Expires:

00106

of Utah determined not to attempt an execution during the appeal process even though no stay against such proceedings was issued.

6. That immediately after this court affirmed the trial court, Mr. Romero and plaintiff had recorded deeds to the properties in question which bear the date of April 1979, but had not been recorded until after this court had issued its opinion.

7. That prior to execution, counsel for Mr. Romero and affiant discussed possible settlement options, none of which came to fruition.

8. That affiant requested and did receive a preliminary title report in the summer of 1980 relative to two parcels, which were subsequently sold at sheriff's sale. Said report listed Mr. Maxfield as fee owner.

9. Affiant had conversations with the renters at the properties being sold, who indicated that notices had properly been posted and showing interest in said properties for possible purchase.

10. Affiant also had conversations with the Salt Lake County Sheriff's office relative to posting and notice and was given verbal confirmation that all was in order.

11. That affiant did know that Mr. Maxfield had filed an action against the Rushtons and had talked with Attorney Nygaard relative to the background of the case. At no time, however, did the State of Utah receive copies of any pleadings, any notices, nor was the State of Utah ever joined as a party until it was served with a complaint by the Rushtons in April, 1981.

12. The State of Utah did not know of any summary judgment hearing until after it was completed, and did not know of the issues therein involved.

13. That the State of Utah, who did in fact prosecute the sale, would need to present its evidence as to the issues involved, now knowing what the issues of the suit are by

STEPHEN G. SCHWENDIMAN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: 533-5261

IN THE SUPREME COURT OF THE STATE OF UTAH

REED MAXFIELD, Plaintiff and Appellant, vs. GLEN A RUSHTON and CAROL RUSHTON, his wife, Defendants and Respondents.	:	AFFIDAVIT IN SUPPORT OF STATE OF UTAH'S OPPOSITION TO INTERMEDIATE APPEAL No. 17719

Stephen G. Schwendiman, having been duly sworn on oath, states as follows:

1. That he is an Assistant Attorney General for the State of Utah.

2. That in June 1979, he prosecuted a welfare fraud action against Lester R. Romero in the Third District Court for Salt Lake County, State of Utah, obtaining judgment on behalf of the State, plus costs, in an amount totalling $15,958.78.

3. That at the time of trial, the State of Utah introduced evidence from the recorders and treasurers offices of Salt Lake County that Lester Romero was even then (June 1977) the owner of property, the subject of the action filed by Mr. Maxfield.

4. That plaintiff Maxfield was called as a witness for Mr. Romero and neither he, nor Mr. Romero ever declared that the property had been transferred.

5. That Mr. Romero appealed that judgment and the State

EXHIBIT 6

00104

Reed Maxfield

Plaintiff(s),

vs.

Owen Rushton

Defendant(s).

: SCHEDULING ORDER

: CASE NO. C80-8167

Pursuant to the scheduling conference held on June 19, 1984, the following dates were set and matters discussed:

1. This case is set for trial on: (1st place): — (3rd) —
(2nd place): 9-10-84 (4th) —
2. Anticipated trial time is two days.
3. The case is set for (non-jury/jury) trial. If jury fee is not paid, it will be paid within 10 days of the date of this order by plaintiff/defendant.
4. All discovery must be completed, including the filing of depositions with the Court, by —.
5. A final pre-trial will be held before the Court on to be set at .m. Counsel who will try the case are to be present. Clients or an individual with authority to settle are also to be present.
6. Date to hear dispositive motions is —.
7. Other matters: —

8. Counsel are advised that they should contact the Court's clerk, Brad Willis, at 535-7506 at least one week in advance of a second place setting trial date to determine if the case will be tried as a second place setting.
9. The foregoing dates should be considered firm settings and will not be modified without Court order and then only upon a showing of manifest injustice.
10. This order constitutes the only notice that the Court will send to counsel.

Dated this 19 day of June, 19—.

DAVID B. DEE
DISTRICT JUDGE

Copies of this scheduling order were mailed to the following parties at the addresses indicated:

Lorin Pace 136 E. South Temple, SLC 84111
Stephen Schwendiman 2990 E. 4310 So SLC 84117
Henry Nygaard 1100 Boston Bldg SLC, 84111

Dated: June 19, 1984

Brad Willis
Court Clerk

00c

Reed Mayfield
Plaintiff(s).

vs.

Iwen A. Rushton et ux
Defendant(s).

SCHEDULING ORDER

CASE NO. C80-8167

Pursuant to the scheduling conference held on April 5, 1984 the following dates were set and matters discussed:

1. This case is set for trial on: (1st place): _____ (3rd) _____
(2nd place): 4-30-84 (4th) _____
2. Anticipated trial time is one days.
3. The case is set for (non-jury ~~jury~~) trial. If jury fee is not paid, it will be paid within 10 days of the date of this order by plaintiff/defendant.
4. All discovery must be completed, including the filing of depositions with the Court, by _____.
5. A final pre-trial will be held before the Court on April 27 at 8:45 A.m. Counsel who will try the case are to be present. Clients or an individual with authority to settle are also to be present.
6. Date to hear dispositive motions is _____
7. Other matters: _____

8. Counsel are advised that they should contact the Court's clerk Brad Willis, at 535-7506 at least one week in advance of a second place setting trial date to determine if the case will be tried as a second place setting.
9. The foregoing dates should be considered firm settings and will not be modified without Court order and then only upon a showing of manifest injustice.
10. This order constitutes the only notice that the Court will send to counsel.

Dated this 5 day of April, 1984.

David B. Dee
DAVID B. DEE
DISTRICT JUDGE

Copies of this scheduling order were mailed to the following parties at the addresses indicated:

Jorin M. Pace 1200 Beneficial Life Tower 84111 364-1300
Henry S. Nygaard 333 North 300 West 84103 328-2506
Stephen Schwendiman 236 State Capitol 84114

Dated: April 5, 1984

Court Clerk

NOTICE TO ALL PARTIES

Any objections to the above certification or any disagreement to any of the matters certified are to be filed in writing with the court within ten days of the date hereof, served upon all parties, and noticed up for hearing upon the law and motion calendar.

The foregoing Certificate is to be used in the Third Judicial District Court as the Request for Trial Setting provided in Rule 4.1 of the Rules of Practice of the District and Circuit Courts, effective March 1, 1982.

BY THE COURT

required, copies of all existing medical reports have been made available to all counsel or parties of record.

4. That there are no motions that have been filed which remain pending and upon which no disposition has been made.

5. That reasonable discussions to effect settlement have been pursued by counsel and their clients but no settlement has been effected. (Such discussions are to be realistic in nature and not limited to an unresponded to offer. The duty to effectively negotiate lies with all parties.)

6. Jury trial is waived. If demanded, $50.00 fee to be enclosed.

Counsel further hereby certifies that the following counsel or pro se parties of record were furnished with a copy of this certificate on the 8 day of February, 1984, whose last known address and telephone number is as follows:

NAME	ADDRESS	TELEPHONE
Mr. Lorin N. Pace Attorney at Law	431 South 300 East Suite B-1 Salt Lake City, UT 84111	328-9623

DATED This 9 day of February, 1984.

BEASLIN, NYGAARD, COKE & VINCENT

Henry S. Nygaard
Attorney for Defendants
333 North 300 West
Salt Lake City, UT 84103
Telephone: (801) 328-2506

HENRY S. NYGAARD
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Defendants
333 North 300 West
Salt Lake City, Utah 84103
Telephone No. 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD, Plaintiff, vs. OWEN A. RUSHTON and CAROL RUSHTON, his wife, Defendants.	CERTIFICATE OF READINESS FOR TRIAL Civil No. C80-8167

TO THE DISTRICT COURT:

Henry S. Nygaard, attorney for Defendants, Owen A. Rushton and Carol Rushton, by his signature below hereby certifies that in his judgment the case is ready for trial and in support of such certification counsel represents to the Court as follows:

1. That all required pleadings have been filed and the case is at issue as to all parties.

2. That counsel has completed all discovery; that opposing counsel has had reasonable time to pursue discovery; and that all discovery of record has been completed.

3. That if medical testimony is contemplated or

any way, interfering with Defendant's tenants, or in any way receiving any rentals in the future.

WHERFFORE, the Defendants pray that the Court enter Judgment on the Counterclaim as follows:

1. Defendants be awarded a Judgment in the sum of $800.00 for rents improperly retained by the Plaintiff.

2. Plaintiff be ordered to refrain from in any way interfering with Defendant's tenants or obtaining any of the rents owing by tenant to the Defendant.

3. Any other relief the Court deems just in the premises.

DATED this 1 day of April, 1981.

BEASLIN, NYGAARD, COKE & VINCENT

Henry S. Nygaard
Attorney for Defendants

3. The Plaintiff's are estopped from making any claim against said property because of their fradulent conduct in connection with Lester Romero, and therefore, should be denied any relief.

4. The Defendants further allege:

A. Admit allegations contained in paragraphs one, two, three, and four of said Complaint.

B. Deny allegations contained in paragraphs five, six, seven, eight, and nine of said Complaint.

C. Defendants specifically allege that Maxfield at no time had any rightful interest in and to the said property, and that dealings between Romero and Maxfield were fraudulent in nature as a means of trying to prevent the State of Utah from knowing that Lester Romero was the true and correct fee title owner of said property.

WHEREFORE, the Defendants pray that the Plaintiff's Complaint be dismissed with prejudice, the Plaintiff to bear all costs of this action.

COUNTERCLAIM

The Defendants, Owen Rushton and Carol Rushton, his wife, counterclaim against the Plaintiff as follows:

1. Since October 1, 1980, the date said property was sold by Sheriff's Sale, the Plaintiff personally and by and through his agent, Lester Romero, have continually harrassed the tenants of the Plaintiff with respect to said premises, and have been wrongfully collecting the rents, thus depriving Rushton's, the owners of the property, the rents to which they are entitled.

2. The Plaintiffs have received approximately $800.00 in rents that is the property of the Defendants. Defendants have made demand for return of said rents, but the Plaintiff has refused to pay said rents over to the Defendants.

3. The Defendants are entitled to receipt of the rents improperly obtained by the Plaintiff, and are further entitled to an Order of this Court compelling the Plaintiff to refrain from in

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SALT LAKE COUNTY
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W. STERLING EVANS, CLERK
3RD DIST COURT
BY Rosemary McDonnell
DEPUTY CLERK

HENRY S. NYGAARD, ESQ.
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Defendants
1100 Boston Building
Salt Lake City, Utah 84111
Telephone No. (801) 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD,

Plaintiff,

vs.

OWEN A. RUSHTON, and CAROL RUSHTON, his wife,

Defendants.

ANSWER AND COUNTERCLAIM

OWEN A. RUSHTON, and CAROL RUSHTON, his wife,

Third-Party Plaintiffs,

vs.

STATE OF UTAH, by and through Utah State Department of Social Services,

Third-Party Defendants.

Civil No. 80-8167

The Defendants answer the Plaintiff's Complaint as follows:

1. That the Plaintiff's Complaint fails to state a cause of action upon which relief can be granted, and therefore said Complaint should be dismissed with prejudice.

2. That the Plaintiff, Reed Maxfield has no interest in the real property which is the subject matter of this litigation in that the State of Utah, by and through the State Department of Social Services legally and lawfully sold said property by Sheriff's Sale on October 1, 1980 pursuant to a Judgment entered against Lester Romero, also known as Ralph G. Romero on June 29, 1979 in case number 216937. Owen Rushton and Carol Rushton are the legal, lawful owners of said property pursuant to said Sheriff's Sale.

ADDENDUM

August 31, 198/. The lower court's dismissal in favor of Defendants Rushton and Third-Party Defendants, State of Utah, should be sustained.

DATED this 18th day of April, 1988.

STEPHEN G. SCHWENDIMAN
Chief, Assistant Attorney General
Tax & Business Regulation Div.

BERNARD M. TANNER
Assistant Attorney General
Tax & Business Regulation Div.

LEONARD E. MCGEE
Assistant Attorney General
Tax & Business Regulation Div.

MAILING CERTIFICATE

I certify that on this 18th day of April, 1988, I caused to be mailed, by deposit in the United States Mail, two copies of the foregoing Brief to the following:

Lorin N. Pace
350 South 400 East
Salt Lake City, Utah 84111

Henry S. Nygaard
Beaslin, Nygaard, Coke & Vincent
330 North 3rd West
Salt Lake City, Utah 84116

existed until six months from September 30, 1987 as set forth in the Order of Judge Young dated September 30, 1987. There is no reason to overturn the lower court. The decision should be affirmed.

It is emphasized that in the original answer filed by Mr. Nygaard for Defendants at paragraphs 3 and 4.C. (R 54). Defendant Rushton's specifically allege that the conveyances by which Maxfield claimed his interest were fraudulent; that the Defendants Rushtons, and the Third-Party Defendant State of Utah, Co-Respondent have set this at issue in each of their pleadings and at all oral arguments the allegations that Maxfield had doubtful interest the properties in question though admitted recorded title.

Appellants have wholly failed throughout this protracted litigation to prove their title and/or interest and were not prepared to do so on August 31, 1987, and Judge Young, based on the record and the statements at pre-trial, acted properly in dismissing said action.

The dismissal of the case in its entirety by Judge Young leaves at rest this issue and all other factual disputes as Plaintiffs were not prepared for trial on September 15, 1987, as they were so ordered to be. This puts to rest the issue of Rushtons' proper interest in the real property as purchased at sale. This factual issue is not before the Court, nor should it be considered in this appeal. All issues in fact and law were dismissed, rightly, as to Plaintiffs at the pre-trial hearing on

ownership prior to the transfer; (3) the State's judgment was obtained at a time when the property was in the name of Lester Romero on the records of the Salt Lake County Recorders Office.

This Court should therefore sustain the actions of the Trial Judge in dismissing the matter for failure to prosecute as has been previously argued. In so doing, this issue is extinguished as an issue for the Court to consider.

CONCLUSION

This matter has been set for trial four times. Appellants continuously sought more time to prepare even to and including the September, 1987 trial setting. At all times, the Defendants and Third-Party Defendant and Co-Respondents State of Utah were prepared to go to trial. The Trial Court did not abuse its discretion in dismissing the case for failure to prosecute. This court should affirm that decision.

The Third District Court's denial of the Motion for Summary Judgment on the 27th day of March, 1981 by Judge James Sawaya and the subsequent answer filed by Respondent Rushtons', left the allegation of fraud as a factual issue to be determined at trial. This action on the part of the court was proper and should be sustained.

Judge Sawaya's Order of March 27, 1981, preserved to Appellant any right of redemption he may have in himself or through the original conveyor, Lester Romero or any of the alleged invalid corporate entities or partnerships through which Maxfield claims his chain of title, and that right of redemption

Reed R. Maxfield
410 East 7620 South
Midvale, Utah 84047
Telephone 255-8465

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

---ooOoo---

REED MAXFIELD, Plaintiff, vs. OWEN A. RUSHTON and CAROL RUSHTON, his wife, Defendants.	OBJECTION TO HEARING ON MOTION FOR IMMEDIATE TRIAL DATE AND ANY OTHER MOTIONS NOW PENDING
OWEN A. RUSHTON and CAROL RUSHTON, his wife, vs. STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES, Third Party Defendants.	Civil No. 80-8167
STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES, Third Party Defendant and Third Party Complainants, vs.	Judge: David Young

: UTAH)
: Salt Lake) SS

Margaret A. Nelson being duly sworn, says:

That she is employed in the offices of Beaslin, Nygaard, Coke & , attorneys for defendants herein; that rved the attached Motion for Immediate Trial Date the following parties acing a true and correct copy thereof in an envelope addressed to

Mr. Reed Maxfield
+10 East 7620 South St.
Midvale, Utah 84047

Lorin N. Pace, Esq.
136 East South Temple
1200 University Club Bldg.
Salt Lake City, Utah 84111

Charles C. Brown, Esq.
36 South State Street, #2000
Salt Lake City, Utah 84111

William T. Thurman, Esq.
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133

Stephen C. Schwendiman, Esq.
130 State Capitol Building
Salt Lake City, Utah 84114

and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 24th day of April, 1987.

Margaret A. Nelson

Subscribed and sworn to before me this 24th day of April, 1987.

Carolyn S. Corkery
Notary Public
residing at Salt Lake City, Utah

My Commission Expires:
6.22.90

vs. :

REED MAXFIELD, :

Plaintiff and Third Party Defendant. :

The defendants, Owen A. Rushton and Carol Rushton, by and through their attorney, Henry S. Nygaard, move the court to set an immediate trial date in the above-entitled matter upon the grounds that the case has been pending since 1980. Furthermore, discovery has been completed and although the plaintiff, Reed Maxfield, has filed for protection under the bankruptcy laws of the United States, the Bankruptcy Court Judge John Allen has specifically lifted any stay of proceedings and has authorized the Third Judicial District Court to hear the above-entitled matter at its pleasure.

DATED this 17 day of April, 1987.

BEASLIN, NYGAARD, COKE & VINCENT

Henry S. Nygaard
Attorney for Defendants

HENRY S. NYGAARD, ESQ. (#2435)
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Defendants
333 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD,

Plaintiff,

vs.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Defendants.

MOTION FOR IMMEDIATE TRIAL DATE

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Third Party Plaintiffs,

vs.

STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendant,

Civil No. 80-8167

Judge: David Young

STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendant and Third Party Complainant,

STATE OF UTAH)
) SS:
County of Salt Lake)

ALICE ANDERSEN, being duly sworn, says:

That she is employed in the offices of Beaslin, Nygaard, Coke & Vincent, attorneys for defendants and third party plaintiffs, Owen A. Rushton and Carol Rushton herein; that she served the attached Notice to Appoint Substitute Counsel upon the following individuals by placing a true and correct copy thereof in an envelope addressed to

Reed Maxfield
410 East 7620 South Street
Midvale, Utah 84047

Lorin N. Pace, Esq.
136 East South Temple
1200 University Club Building
Salt Lake City, Utah 84111

Charles C. Brown, Esq.
36 South State Street, #2000
Salt Lake City, Utah 84111

William T. Thurman, Esq.
Attorney at Law
1200 Kennecott Building
10 East South Temple Street
Salt Lake City, Utah 84133

Stephen C. Schwendiman, Esq.
130 State Capitol Building
Salt Lake City, Utah 84114

and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 20th day of March, 1987.

Alice Andersen

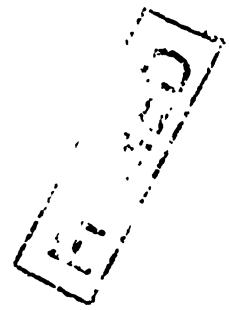
Subscribed and sworn to before me this 20th day of March, 1987.

Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

7/21/87

HENRY S. NYGAARD, ESQ. USB NO. 2435
Attorney for
BEASLIN, NYGAARD, COKE & VINCENT
333 North 300 West Street
Salt Lake City, Uah 84103
Telephone No. 328-2506



IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,

STATE OF UTAH

REED MAXFIELD,	:	
Plaintiff,	:	NOTICE TO APPOINT SUBSTITUTE COUNSEL
vs.	:	
OWEN A. RUSHTON, et ux.,	:	HONORABLE SCOTT DANIELS
Defendants.	:	Civil No. C-80-8167

TO THE PLAINTIFF ABOVE NAMED:

Owen A. Rushton and Carol Rushton, his wife, defendants and third party plaintiffs in the above entitled matter, hereby give notice to the plaintiff that they intend to press the above entitled matter to a conclusion, and therefore, plaintiff should appoint substitute counsel to represent him in this matter, or be prepared to appear personally.

DATED this 20th day of March, 1987.

BEASLIN, NYGAARD, COKE & VINCENT

By _____
Henry S. Nygaard
Attorney for Owen A. and
Carol Rushton

vs. :

REED MAXFIELD, :

Plaintiff and Third Party Defendant. :

:

Please be advised that Lorin N. Pace has withdrawn as counsel for the Plaintiff in the above entitled action.

DATED this 4 day ~~November, 1986.~~ March, 1987

Lorin N. Pace

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Notice of withdrawal of Attorney was mailed, postage pre-paid, to Charles C. Brown, Beneficial Life Tower #2000, 36 South State Street, Salt Lake City, Utah 84111; William Thomas Thurman, Suite 1200 Kennecott Building, 10 East South Temple, Salt Lake City, Utah 84133; Stephen C. Schwendiman, Assistant Attorney General, 130 State Capitol, Salt Lake City, Utah 84114; and to Henry S. Nygaard, 333 North 300 West Street, Salt Lake City, Utah 84103, this 4 day of March, ~~1986.~~ 1987

7.34

Lorin N. Pace #2498
PACE & BJORKLUND
1200 University Club Building
136 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 364-1300

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

REED MAXFIELD,

Plaintiff,

vs.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Defendants.

NOTICE OF WITHDRAWAL OF ATTORNEY

Civil No. 80-8167

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Plaintiff,

vs.

STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendants.

STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendants and Third Party Complainants,

CERTIFICATE OF DELIVERY

I hereby certify that a true and exact copy of the foregoing ORDER ON MOTION OF THE DEPARTMENT OF SOCIAL SERVICES, STATE OF UTAH TO LIFT A STAY was mailed first class, postage prepaid, to the following on this 25 day of February, 1987:

Henry S. Nygaard, Esq.
333 North 300 West
Salt Lake City, UT 84103

Charles C. Brown, Esq.
Attorney at Law
Beneficial Life Tower
Salt Lake City, UT 84111

Douglas Cannon
Twelfth Floor
215 South State
Salt Lake City, UT 84111

Brian Cannon
210 Prowswood Plaza
4885 South 900 East
Salt Lake City, UT 84111

Reed R. Maxfield
410 East 7620 South
Midvale, UT 84017

William Thomas Thurman, Esq.
Attorney at Law
Kennecott Bldg.
Salt Lake City, UT 84111

BERNARD M. TANNER
Assistant Attorney General
for the State of Utah

hereby certify that the annexed and foregoing
a true and com[illegible] of a document on
e in the U[illegible] Bankruptcy Court
r the District of
Dated: FEB 25 1987
Attest:
Deputy Clerk

3. That the State of Utah be granted a judgment evidencing that said execution and sale were proper.

4. For such other and further relief as to the court seems proper.

DATED this 24th day of Sept, 1984.

BERNARD M. TANNER
Assistant Attorney General

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

5. That on information and belief, the Third-Party Defendant and Third-Party Claimant alleges they can produce a witness at trial who is prepared to testify that he spent more than four months attempting to find a person of Lee Flynn, an officer of Golden Circle, and that he was unable to locate such a person, and on said representation, does not believe that Lee G. Flynn exists as an individual or as an officer of said Golden Circle Investment, the purported conveyor of title to Reed Maxfield, Plaintiff herein.

6. That based on the affidavit of Stephen G. Schwendiman, Assistant Attorney General, specifically paragraphs 11 through 15, a question as to the validity of plaintiff's title and a question as to the validity of the interest of Reed Maxfield, if any, in the subject properties is raised as a serious question of fact and the same is entitled to both discovery and strict proof at trial.

7. That it would be just and proper for plaintiff to have the burden to prove good title prior to establishing his standing to sue as the one proceeds the other.

Wherefore Third-Party Defendant and Third-Party Complainant prays for relief as follows:

1. That should the Rushton's obtain judgment against the State of Utah, that the State of Utah would have judgment over and against Reed Maxfield in total based on a failure of good title in the Plaintiff, the moving party herein.

2. That the State would be reimbursed for costs and attorneys fees for this action against Reed Maxfield, plaintiff herein, for an action brought without proper standing.

COMES NOW Bernard M. Tanner, and Stephen G. Schwendiman, Assistant Attorneys General, on behalf of the State of Utah, by and through Utah State Department of Social Services, the Third-Party Defendant and Third-Party Complainant in this case, and amend their Third-Party Complaint as follows:

1. That the State of Utah is entitled to judgment over and against Reed Maxfield, Plaintiff, if judgment against the State of Utah is taken by tne Rushtons.

2. Tnat on information and belief, it is alleged that tne transfer of wnatever interest tne plaintiff, Reed Maxfield, obtained from Golden Circle Investment was not a bona fide transfer for value and was not a transfer of good title, and the same was invalid, and that the deed and existing evidence of payment of said deed are questionable if not fraudulent, and therefore the deed is not legal and the plaintiff, Reed Maxfield, nas no standing to bring this action.

3. Tnat if said transfer is invalid as alleged on information and belief, the plaintiff does not have standing to sue in tnis case, and has no standing to allege any right, title, or interest in the property sold in case 216937 wherein the interest of Lester R. Romero was sold based on the judgment in tne aforementioned case.

4. That based on the answer and counter-claim, there is no evidence as to questionable posting or improper sale as to the Colorado Street property, and this court should find that tne question, if any, as to improper sale attacnes solely to the 3020 West 2995 South property.

DAVID L. WILKINSON
Attorney General
BERNARD M. TANNER
Assistant Attorney General
STEPHEN SCHWENDIMAN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: 533-5007

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REED MAXFIELD,

Plaintiff,

vs.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Defendants.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

vs.

STATE OF UTAH, by and through Utah State Department of Social Services,

Third Party Defendants

STATE OF UTAH, by and through Utan State Department of Social Services,

Third Party Defendant and Third Party Complainant,

vs.

REED MAXFIELD,

Plaintiff and Third Party Defendant

Ed Addendum To ~~AMENDED~~ THIRD PARTY COMPLAINT

Civil Number 80-8167

Bernard M. Tanner, Assistant Attorney General for the State of Utah, was heard on the motion. Henry Nygaard, Esq. appeared for the defendants in the state action previously filed by Mr. Maxfield. Charles Brown, Esq. appeared with Mr. Maxfield and represents Utah's Great Game Preserve as that interest may appear. After argument by all parties and the Court being fully apprised of the nature of the motion,

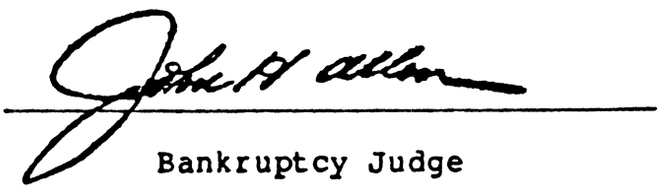
IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The motion to lift a stay is denied.

2. As this is an action by the debtor as a party plaintiff against third parties, this claim was not subject to an automatic stay under Section 362(d) of the Bankruptcy Code.

3. The matter should be tried in state court where it commenced as there is no stay in Bankruptcy No. 84A-03391 against Civil No. 80-8167 in the Third District Court for the State of Utah. 2-25-87

BY THE COURT:



Bankruptcy Judge

DAVID L. WILKINSON #3472
Attorney General
STEPHEN C. SCHWENDIMAN #2891
Division Chief
BERNARD M. TANNER #3185
Assistant Attorney General
Tax & Business Regulation Div.
130 State Capitol
Salt Lake City, UT 84114
Telephone: (801)533-5319

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

IN THE MATTER OF REED R. MAXFIELD, Debtor.	:) :) :) :	Bankruptcy No. 84A-03391 (Chapter 11) ORDER ON MOTION OF THE DEPARTMENT OF SOCIAL SERVICES, STATE OF UTAH TO LIFT STAY

This matter came before the Honorable John Allen, Bankruptcy Judge, February 20, 1987 at 4:18 p.m., and is amended to be in Bankruptcy No. 84A-03391 rather than 84A-00391 as noted. This is on a motion by the State of Utah, a third party defendant and third party complainant in a Third District Court case, Civil No. 80-8167, wherein Reed R. Maxfield, debtor in this case, is a party plaintiff.

This proceeding was to request a lift of stay to allow an immediate trial of this matter in Third District Court of the State of Utah.

CERTIFICATE OF DELIVERY

I hereby certify that a true and exact copy of the foregoing MOTION OF THE STATE OF UTAH, DEPARTMENT OF SOCIAL SERVICES, THIRD PARTY DEFENDANT AND THIRD PARTY COMPLAINANT, RENEWED REQUEST FOR IMMEDIATE TRIAL AND MOTION TO DISMISS THE OBJECTION PREVIOUSLY FILED BY ATTORNEY CHARLES BROWN TO PROCEEDING WITH TRIAL was mailed first class, postage prepaid, to the following on this 25 day of February, 1987:

Henry S. Nygaard, Esq.
333 North 300 West
Salt Lake City, UT 84103

Charles C. Brown, Esq.
Attorney at Law
Beneficial Life Tower
Salt Lake City, UT 84111

Douglas Cannon
Twelfth Floor
215 South State
Salt Lake City, UT 84111

Brian Cannon
210 Prowswood Plaza
4885 South 900 East
Salt Lake City, UT 84111

Reed R. Maxfield
410 East 7620 South
Midvale, UT 84017

William Thomas Thurman, Esq.
Attorney at Law
Kennecott Bldg.
Salt Lake City, UT 84111

BERNARD M. TANNER
Assistant Attorney General
for the State of Utah

Counsel respectfully requests the matter be set for hearing for argument on the _____ day of March, 1987 in district court before the Honorable _____, Judge of the Third District Court so that a trial date may be set and further that the Court may rule on the motion of the State of Utah to dismiss the objection of Charles Brown, Attorney at Law, on behalf of parties as their interest may appear.

DATED this 25 day of February, 1987.

BERNARD M. TANNER
Assistant Attorney General

Third Party Defendant and Third Party Complainant,	:) :) :
vs.	:) :
REED R. MAXFIELD,	:) :
Plaintiff and Third Party Defendant.	) :)

Comes now Bernard M. Tanner, Attorney for the State of Utah, Utah State Department of Social Services, and respectfully petitions the Court in this renewal of the motion of Defendants filed November 24, 1986, to proceed with trial and further, a motion to dismiss the objection to readiness for trial as previously filed by attorney Charles Brown for parties as his interest may appear.

The basis for this renewal of our motion for immediate trial is that a motion for lifting stay in bankruptcy court was filed, a hearing was held on the 20th day of February, 1987 at 4:20 p.m. before the Honorable John Allen, and based on the representations of the party the Court ruled that due to the fact that the motion in district court is by Reed Maxfield as a plaintiff against third parties not a party to the chapter 11 bankruptcy proceeding he filed, that there is no automatic stay under Section 362 of the Bankruptcy Code.

DAVID L. WILKINSON #3472
Attorney General
STEPHEN C. SCHWENDIMAN #2891
Division Chief
BERNARD M. TANNER #3185
Assistant Attorney General
Tax & Business Regulation Div.
130 State Capitol
Salt Lake City, UT 84114
Telephone: (801)533-5319

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

REED R. MAXFIELD, Plaintiff, vs. OWEN A. RUSHTON and CAROL RUSHTON, his wife, Defendants.	Civil No. 80-8167
OWEN A. RUSHTON and CAROL RUSHTON, his wife, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendants.	MOTION OF THE STATE OF UTAH, DEPARTMENT OF SOCIAL SERVICES, THIRD PARTY DEFENDANT AND THIRD PARTY COMPLAINANT, RENEWED REQUEST FOR IMMEDIATE TRIAL AND MOTION TO DISMISS THE OBJECTION PREVIOUSLY FILED BY ATTORNEY CHARLES BROWN TO PROCEEDING WITH TRIAL
STATE OF UTAH, by and through Utah State Department of Social Services,	

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 1986, I caused to be mailed, first class postage prepaid, a true and correct copy of the foregoing Objection to Certification of Readiness for Trial to:

Henry S. Nygaard
BEASLIN, NYGAARD, COKE & VINCENT
333 North 300 West Street
Salt Lake City, UT 84103

William T. Thurman
McKAY, BURTON & THURMAN
Suite 1200 Kennecott Bldg.
10 East South Temple
Salt Lake City, UT 84133

Stephen C. Schwendiman
Assistant Attorney General
130 State Capitol
Salt Lake City, UT 84114

Lorin N. Pace
University Club Bldg., #1200
136 East South Temple
Salt Lake City, UT 84111

Great Game Preserves and counsel need to be finalized.

DATED this 25 day of November, 1986.

Charles C. Brown

REED MAXFIELD, :

Plaintiff and :
Third Party Defendant.

---ooOoo---

Charles C. Brown as counsel for Utah's Great Game Preserves, a Chapter 11 debtor - for this purpose only files this objection:

1) Reed Maxfield filed a Chapter 11 in 1985 and the confirmed Plan of Reorganization transfers this claim to Utah's Great Game Preserves.

2) A Motion to Amend Maxfield's pleadings was pending when Maxfield filed his petition. Before proceeding, the pleadings should be amended to add claims against the State and Stephen C. Schwendiman.

3) Discovery is not complete. Depositions need to be taken of the secretary to Stephen C. Schwendiman, who is the daughter of the Rushtons who bought the homes at the Sheriff's sale conducted by Schwendiman. A deposition needs to be taken of the Sheriff serving the notices at the property. A deposition need to be taken of an assistant County Attorney having relevant knowledge of certain issues. Interrogatories need to be served and answered. Documents need to be produced.

4) A stay in the Bankruptcy is effective to date.

5) This attorney has not had time to familiarize himself with the case in order to have effective settlement discussions. Further, an agreement between Maxfield, Utah's

Charles C. Brown
Jeffrey B. Brown
BROWN & BROWN, P.C.
Attorneys for Plaintiff
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

---ooOoo---

REED MAXFIELD,

Plaintiff,

vs.

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

Defendants.

OBJECTION TO CERTIFICATION OF READINESS FOR TRIAL

OWEN A. RUSHTON and CAROL RUSHTON, his wife,

vs.

STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendants.

Civil No. C80-8167

STATE OF UTAH, BY AND THROUGH UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Third Party Defendant and Third Party Complainants,

vs.

for in Rule 4.1 of the Rules of Practice of the District and Circuit Courts, effective March 1, 1982.

BY THE COURT

Reed R. Maxfield

Plaintiff and

third party defendant

Reed Maxfield for himself files this objection:

1. Reed Maxfield as a layman is not capable of properly defending this case himself and needs a Lawyer to do so.

2. Reed Maxfield met with Loni F. Deland, Attorney at Law around the 1st of April 1987 and asked Mr. Deland to represent him in this case. I did leave my files with Mr. Deland and later obtained other exhibits he requested and then took those to his office. Mr. Deland informed me at that meeting he would be out of State on some other law suits off and on during April and he thought he could look my case over in a couple of weeks and would then let me know. He said from what I told him he probably would want the case. He did tell me he was booked with trials and case loads really heavy through June.

3. However it was about the first week of May before he had a Mr. McRae, a Lawyer from Vernal, Utah came to Salt Lake City and contacted me. I spent time on two different days going over and reviewing the case with Mr. McRae. I was real pleased with the knowledge Mr. Mcrae had from studying the case before I even met with him the first day. Mr. Deland has not been able to personelly meet with me since our 1st meeting.

4. Mr. Deland wrote me a letter dated May 13, 1987 (5 days ago) stating he and Mr. McRae had reviewed my file and had discussed the matter of representing me as per my request. And he stated they were willing to represent me on certain financial terms.

5. I received that letter today Monday 18the May 1987.

6. I was careful in representing my financial proposal to Mr. Deland in April concerning the paying for the cost of Attorney bills and court costs. The terms Mr. Deland presented in his letter of the 13th concerning their counter proposal of Attorney fees came to me as a surprise and was very different.

7. I will (diligently) seek new council with (up most) speed if with in this week I cannot come to terms with Mr. McRae and Mr. Loni Deland on Attorney fees.

8. I did by letter in April inform Mr. Nygaard that I had contacted Mr. Loni Deland and requested he represent me in this case. And it is only the (counter) offer they have made to my original proposal on paying their Attorney fees that is

presently stopping their representing me in this case

9. There is some very technical unfinished issues involved that a layman such as I could not begin to handle. Plus I need to amend my Complaint.

10 I will within 2 weeks notify both the court and Mr. Nygaard as to my progress.

11. I, therefore request that the motion by Mr. Nygaard and any other pending motion be cancelled while I (speedily) obtain other legal council to represent me.

Dated this 18 day of May 1987.

Reed Maxfield

Reed Maxfield

Copy to Henry Nygaard.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Reed Mayfield

Plaintiff(s),

vs.

Owen A. Knudsen

Defendant(s).

: SCHEDULING ORDER AND TRIAL NOTICE

: CASE NO. C80-8167

Pursuant to the scheduling conference held on 6/1/87 the following dates were set and matters discussed:

1. This case is set for trial on: September 15, 1987 at 10:00a
2. Anticipated trial time is 3 days.
3. This case is set for (non-jury/jury) trial. If jury fee is not paid, it will be paid within 10 days of the date of this order by plaintiff/defendant.
4. All discovery must be completed, including the filing of depositions with the Court by _____.
5. A final pre-trial will be held before the Court on August 31, 1987 at 2:00 p.m. Counsel who will try the case are to be present. Clients or an individual with authority to settle the case are also to be present.
6. Date to hear dispositive motions is 8/17/87.
7. Other matters: _____

8. The foregoing dates should be considered firm settings and will not be modified without Court order and then only upon a showing of manifest injustice.
9. This order constitutes the only notice that the Court will send to counsel.

Dated this 1 day of June, 1987.

David S. Young

DAVID S. YOUNG
DISTRICT COURT JUDGE

Copies of this scheduling order were mailed to the following parties at the addresses indicated:

Charles C Brown - 175 E. 400 So. Ste 401 SLC 84111
Henry Nuggard - 333 No. 300 W. SLC 84103
Stephen J Schwendiman - Bernard Tanner - 130 State Capitol SLC 84114

Dated: 6/1/87

Cindy Porter

COURT CLERK

Charles C. Brown (1447)
Jeffrey B. Brown (0457)
BROWN, SMITH & HANNA
Attorneys for Plaintiffs
City Centre I, Suite 401
175 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 355-5656

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REED MAXFIELD AND UTAHS' GREAT GAME PRESERVE, Plaintiffs, vs. OWEN A. RUSHTON, CAROL RUSHTON, et al, Defendants.	MOTION TO CONTINUE TRIAL DATE OR IN ALTERNATIVE TO EXTEND DISCOVERY AND MOTION CUTOFF DATE
OWEN A. RUSHTON and CAROL RUSHTON, Third-Party Plaintiffs, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third-Party Defendant and Third-Party Plaintiff, vs. REED MAXFIELD, Third-Party Defendant.	Case No. 80-8167 Judge David Young

Come now plaintiffs, by and through counsel, and hereby move this court for an Order continuing the trial date in the above entitled matter for a period of approximately two months. Alternatively, plaintiffs move this court for an order allowing

plaintiffs additional time past August 17, 1987 in which to finalize discovery. This motion is based upon the following reasons:

1. Although the case is very old, and has been stayed due to the filing of Chapter 11 Bankruptcy Petitions by plaintiffs, present counsel for plaintiffs only recently became involved.

2. Counsel for plaintiffs have several Bankruptcy Court trials set for trial in September, 1987, which trial dates have been pending for many months, if not years, and which would be inconvenient to reschedule. Additionally, this court/Judge Frederick recently set for trial in October a large case involving counsel, and extensive preparation is needed to be ready to try that case.

3. Present counsel has served Interrogatories, Requests for Admissions and Requests for Production of Documents upon all parties in the lawsuit, which were served July 15, 1987. Responses to said discovery are due Friday, August 14, 1987. Presently, this would only allow for completion of discovery by way of depositions based upon said Interrogatories and Requests on Monday, August 17, 1987, one business day after the responses are due. If the responses are not provided timely or are evasive, no additional discovery could be completed.

4. Plaintiffs intend to file an amended complaint on or before August 17, 1987 naming additional defendants. Time should be allowed for said defendants to be served, to answer, and to participate in discovery. Further, the amended complaint may raise new allegations and causes against the present parties to the lawsuit, and additional discovery based upon that may be

necessary. Additionally, by order of court, plaintiffs were to file a reply to Rushton's Amended Answer and Counterclaim. Plaintiffs have filed herewith a Motion to Dismiss all claims based upon representations made to the Bankruptcy Court that no claims were made against plaintiffs in this case, in order to obtain relief from the automatic stay in order that this matter could proceed. Depending upon the outcome of that motion, some discovery or additional time to plead should be allowed.

5. Plaintiffs intend to finalize the depositions of the Rushtons and to take depositions of Lyle Summers and several Deputy Sheriffs. Plaintiffs should be allowed some additional time to do this.

WHEREFORE, plaintiffs move this court for an order continuing the trial dates in this matter, presently set for September 15, 16 and 17, 1987, for a period of approximately two months. Alternatively, plaintiffs move this court for an order allowing additional time past August 17, 1987 in which time to conduct discovery.

DATED this 10th day of August, 1987.

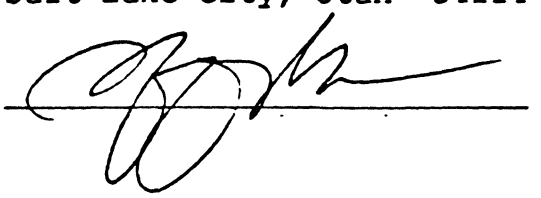
Jeffrey B. Brown

CERTIFICATE OF DELIVERY

I hereby certify that on the 10th day of August, 1987, I caused a true and correct copy of the foregoing to be hand-delivered to:

Henry S. Nygaard
333 North 300 West
Salt Lake City, Utah 84103

Bernard Tanner
130 State Capitol Building
Salt Lake City, Utah 84114



motrusht.uta

DAVID L. WILKINSON #3472
Attorney General
STEPHEN C. SCHWENDIMAN #2891
Division Chief
BERNARD M. TANNER #3185
Assistant Attorney General
Tax & Business Regulation Div.
130 State Capitol
Salt Lake City, UT 84114
Telephone: (801)533-5319

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In Re REED R. MAXFIELD, Debtor.	
REED R. MAXFIELD, Plaintiff, vs. OWEN A. RUSHTON and CAROL RUSHTON, his wife, Defendants.	Bankruptcy No. 84A-00391
OWEN A. RUSHTON and CAROL RUSHTON, his wife, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendants.	AMENDED PETITION OF THE STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF SOCIAL SERVICES, THIRD PARTY DEFENDANT AND THIRD PARTY COMPLAINANT, REQUEST FOR IMMEDIATE TRIAL OR IN THE ALTERNATIVE FOR A LIFT OF STAY TO ALLOW FOR TRIAL OF THE PROCEEDING IN STATE DISTRICT COURT IN CIVIL NO. 80-8167

STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendant and Third Party Complainant, vs. REED R. MAXFIELD, Plaintiff and Third Party Defendant.	:) :) :) :) :) :) :)

Comes now Bernard M. Tanner, Attorney for the State of Utah, appearing in this case as third party defendant and third party complainant in adversary proceeding and respectfully petitions the Court that the matter be set immediately for trial before this bankruptcy court or in the alternative that the stay would be lifted to the degree that the parties may be allowed, with the permission of the bankruptcy judge, to try this matter at the earliest moment in Third District Court in and for Salt Lake County, State of Utah, under the existing civil no. 80-8167, the case number and location for the intended trial prior to the filing of this bankruptcy proceeding.

It is alleged by counsel for the state that it is in the best interest of the parties to have a rapid trial of the

remaining issues relative to the validity of the sheriff's sale which occurred as subject of this case in Third District Court and that it would be to the best interest of all parties concerned to so proceed.

DATED this 4 day of February, 1987.

BERNARD M. TANNER
Assistant Attorney General
for the State of Utah
Third Party Defendant and
Third Party Complainant

DAVID L. WILKINSON #3472
Attorney General
STEPHEN G. SCHWENDIMAN #2891
Chief, Assistant Attorney General
BERNARD M. TANNER #3185
Assistant Attorney General
Tax & Business Regulation Division
Room 130 State Capitol Building
Salt Lake City, Utah 84114
Telephone : (801) 533-5319

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REED MAXFIELD AND UTAHS' GREAT GAME PRESERVE, Plaintiffs, vs. OWEN A. RUSHTON, CAROL RUSHTON, et al., Defendants.	OBJECTION TO PLAINTIFF'S MOTION TO CONTINUE, OR IN THE ALTERNATIVE, TO EXTEND DISCOVERY AND MOTION CUT-OFF DATE Case No. 80-8167
OWEN A. RUSHTON and CAROL RUSHTON, Third-Party Plaintiffs, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third-Part Defendants and Third-Party Plaintiff, vs.	Hon. David Young, Judge

REED MAXFIELD,)

Third-Party Defendant.)

Comes now Bernard M. Tanner, Attorney for State of Utah, by and through Utah Department of Social Services, Third-Party Defendant and Third-Party Plaintiff, and objects to the contents of the Motion as being factually inaccurate, failing to state a proper basis, and failing to give proper notice to parties, and hereby requests the same be dismissed and/or, in the alternative, that the same be set for hearing on August 24, 1987, at 9:00 a.m., before the Honorable Judge David Young.

DATED this 11th day of August, 1987

BERNARD M. TANNER
Assistant Attorney General
Attorney for State of Utah

HENRY S. NYGAARD, ESQ. (Bar No. 2435)
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Owen A. RUshton and Carol Rushton
333 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

REED MAXFIELD AND UTAH'S GREAT GAME PRESERVE, Plaintiffs, vs. OWEN A. RUSHTON, CAROL RUSHTON, et al, Defendants.	DEFENDANTS RUSHTON OBJECT TO PLAINTIFFS' MOTION TO CONTINUE TRIAL DATE OR, IN THE ALTERNATIVE, TO EXTEND DISCOVERY AND MOTION CUT-OFF DATE
OWEN A. RUSHTON and CAROL RUSHTON, Third Party Plaintiffs, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third Party Defendant and Third Party Plaintiff, vs. REED MAXFIELD, Third Party Defendant.	Civil No. C80-8167 Judge: David Young

The defendants Rushton, by and through their attorney, Henry S. Nygaard of the law firm of Beaslin, Nygaard, Coke & Vincent, object to the Notice of Hearing of plaintiffs' Motions to Continue Trial Date or Extend Discovery and Motion Cut-Off Dates and on Motion to Dismiss all Claims Against Plaintiffs set for August 17, 1987, at 9:00 a.m. upon the grounds that the Motions ultimately are in the nature of summary disposition of this matter, and the defendants are entitled to ten (10) days notice pursuant to the rules of Utah Civil Procedure.

Furthermore, defendants' Motions presently before the court are set for hearing on August 24, 1987, at 9:00 a.m., which would be a more appropriate date for all of the parties to argue all motions now before the court.

DATED this 14 day of August, 1987.

BEASLIN, NYGAARD, COKE & VINCENT

Henry S. Nygaard
Attorney for Owen A. Rushton and
Carol Rushton

DAVID L. WILKINSON #3472
Attorney General
STEPHEN J. SORENSON #3049
Chief, Assistant Attorney General
Litigation Division
BERNARD M. TANNER #3185
Assistant Attorney General
LEONARD E. McGEE #2185
Assistant Attorney General
Attorneys for the State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: (801) 533-5261

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REED MAXFIELD AND UTAHS' GREAT GAME PRESERVE, Plaintiffs, v. OWEN A. RUSHTON. CAROL RUSHTON, et al., Defendants.	DEFENDANT'S OBJECTION TO PLAINTIFF'S AMENDED COMPLAINT Civil No. C80-8167
OWEN A RUSHTON and CAROL RUSHTON, Third-Party Plaintiffs, v. STATE OF UTAH, by and through Utah State Department of Social Services, Third-Party Defendant and Third-Party Plaintiff, v. REED MAXFIELD, Third-Party Defendant.	JUDGE DAVID YOUNG

COMES NOW the Defendant's and hereby object to the Plaintiff's Motion to Amend the Complaint, filed on August 17, 1987. The grounds for said objection are as follows:

1) The Statute of Limitations on the Causes of Action have run;

2) The Defendant's are prejudiced in that the Plaintiff has added additional parties, new causes of action, new prayers for relief, the time for discovery in the case has passed, and a firm trial date has been set within 30 days of the proposed amendment;

3) The Defendant's have filed a Motion for Summary Judgment based on the Plaintiff's Second Amended Complaint;

4) The time for new motions has passed, which precludes the Defendant's from further dispositive motions;

5) The Courts' Order of June 8, 1987 bars further motions, amendments to pleadings and discovery subsequent to August 17, 1987. The Plaintiff has not timely filed a Motion to Amend with the Court.

6) The Plaintiff has had ample opportunity to have timely filed Amended Complaints, in that this matter has been before the Court for nearly seven years.

DAVID L. WILKINSON
Attorney General
STEPHEN J. SORENSON
Chief, Litigation Division
Assistant Attorney General

BARNARD TANNER
Assistant Attorney General

LEONARD E. McGEE
Assistant Attorney General
Attorneys for State Defendants

CERTIFICATE OF HAND DELIVERY

This is to certify that I hand-delivered a copy of the foregoing DEFENDANTS OBJECTION TO PLAINTIFF'S AMENDED COMPLAINT to the following this 21st day of August, 1987.

Charles C. Brown, Esq.
Jeffrey B. Brown, Esq.
Brown, Smith & Hanna
Attorneys for Plaintiff
City Centre I, Suite 401
175 East 400 South
Salt Lake City, Utah 84111

Henry S. Nygaard, Esq.
Beaslin, Nygaard, Coke & Vincent
Attorneys for Rushtons
333 North 300 West
Salt Lake City, Utah 84103

FILED

FILE NO. C80-8167

(✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
Ed Mayfield ✓	J. Brown ✓ C. Brown ✓
VS.	
Wen A. Rushton, Etal	H. Nygaard ✓ S. Schwendiman
	B. Tanner ✓ L. McGee ✓

Vicky Porter CLERK

REPORTER

BAILIFF

HON. David S. Young JUDGE

DATE: August 31, 1987

THE ABOVE ENTITLED CASE COMES NOW ON REGULARLY BEFORE THE COURT FOR E-TRIAL CONFERENCE. COUNSEL APPEARING AS NOTED ABOVE.

WHEREUPON THE FOLLOWING ISSUES ARE DISCUSSED BETWEEN RESPECTIVE COUNSEL D THE COURT. THE COURT NOW ORDERS THE ABOVE ENTITLED CASE BE SET FOR THE LLOWING (SEE BELOW) OR SETTLED.

	DATE	TIME
(1) DISCOVERY CUT-OFF DATE		
(2) MOTIONS		
(3) DATE FOR PRE-TRIAL CONFERENCE		
(4) LENGTH OF TRIAL JURY OR NON-JURY		
(5) TRIAL DATE Stricken	9/15/87	
(6) SETTLEMENT		

Based upon pltf's motion to withdraw from the Case and upon pltf's failure to prosecute the Case, the Court orders the Case is hereby dismissed. Mr. Nygaard to prepare order of dismissal.

000437

PAGE ___ OF ___

Charles C. Brown (1447)
Jeffrey B. Brown (0457)
BROWN, SMITH & HANNA
Attorneys for Plaintiffs
City Centre I, Suite 401
175 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 355-5656

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REED MAXFIELD, Plaintiff, vs. OWEN A. RUSHTON, CAROL RUSHTON, et al, Defendants.	MOTION TO WITHDRAW
OWEN A. RUSHTON and CAROL RUSHTON, Third-Party Plaintiffs, vs. STATE OF UTAH, by and through Utah State Department of Social Services, Third-Party Defendant and Third-Party Plaintiff, vs. REED MAXFIELD, Third-Party Defendant.	Case No. 80-8167 Judge David Young

COME NOW Charles C. Brown and Jeffrey B. Brown, attorneys for Reed Maxfield in the above-captioned case, and hereby move this court pursuant to Rule 2.8, Rules of Practice for the District and Circuit Courts of Utah, for an Order allowing their withdrawal as counsel on behalf of Reed Maxfield. Trial is

presently set for September 15, 1987. This Motion is based upon the following grounds and upon the Affidavit of Jeffrey B. Brown filed herewith:

1. There is an Attorney Lien in this case filed by Lorin Pace. Current counsel agreed to appear in this case provided that Mr. Maxfield would obtain from Lorin Pace a Release of the Attorney's Lien. Mr. Maxfield agreed to do this, and has repeatedly represented that he has obtained said Release and would provide it to present counsel, but, contrary to said agreement and representations, he has not obtained or provided said Release of Attorney's Lien. It would severely jeopardize the efforts of attorneys herein and would jeopardize the possibilities of them being paid for their efforts to require their continuance with said Attorney Lien in place.

2. Current counsel agreed to enter into the case only upon the express understanding and agreement that Mr. Maxfield would sign a Fee Agreement secured by real property. Pursuant thereto, a Fee Agreement was prepared and documents necessary to pledge real property were provided to Mr. Maxfield in early June, 1987, immediately upon counsel coming into the case. Mr. Maxfield indicated that he would sign the Fee Agreement and pledge the real property. From time to time, at the request of current counsel that these documents be provided, Mr. Maxfield has repeatedly indicated that the Fee Agreement and security on real property had been signed but that he did not have them in his possession but he would obtain the same. He has still not

provided these to current counsel.

3. On Friday, August 28, 1987, secretary for counsel telephoned Mr. Maxfield to remind him of the time of the Pre-Trial Conference and also to remind him to provide to counsel the Attorney Release of Lien, the signed Fee Agreement and the security on real property during the morning of August 31, 1987. To this request, Mr. Maxfield agreed.

4. Despite said agreement, as of the time of the Pre-Trial Conference, Mr. Maxfield has failed to provide counsel with the Attorney Release of Lien, the Fee Agreement and the security on real property. Instead, after the telephone conference Mr. Maxfield delivered letters to current counsel expressing his displeasure with current counsels' handling of the case.

5. As a result thereof, current counsel has no Fee Agreement with Mr. Maxfield and cannot agree with Mr. Maxfield as to how the case should be handled. Mr. Maxfield has written several letters indicating his displeasure with the way counsel is handling his case and has expressed a dissatisfaction with current counsel.

6. Current counsel agreed to the early trial setting in September based upon stipulation of opposing counsel that we could file an Amended Complaint on or before August 17, 1987. At the time of that stipulation, opposing counsel did not express any concern about new parties who might be brought in or additional discovery that might be made and therefore current counsel was not concerned about it. However, upon filing the

Amended Complaint opposing counsel objected, contrary to earlier agreement, and the filing of the Amended Complaint has been denied by this court. Trying the case under an Amended Complaint was one of the basic reasons for entering the case, which has been denied.

7. Current counsel understood they would be handling this case strictly as a claim by plaintiff to obtain assets for the estate from defendants and would not be defending plaintiff from any counterclaims of defendants, based upon the Relief from Stay obtained from the Bankruptcy Court and based upon representations made by opposing counsel to the Bankruptcy Court Judge. Pursuant thereto, current counsel filed Motions to Dismiss the Counterclaims of the defendants against plaintiff which Motion was denied. This reason upon which counsel came into the case has also been removed.

WHEREFORE, these attorneys respectfully request that the court allow their withdrawal as counsel on behalf of Mr. Maxfield based upon the foregoing factors. It would be highly prejudicial to current counsel to be required to continue through the case given the disagreements between Mr. Maxfield, given the promises which have been breached, given the fact that counsel have not been able to obtain, despite diligent efforts and repeated requests, a signed Fee Agreement secured by property which was the basic understanding that counsel had with Mr. Maxfield upon entering this case.

DATED this 31st day of August, 1987.

BROWN, SMITH & HANNA

Charles C. Brown, Esq.

Jeffrey B. Brown, Esq.

CERTIFICATE OF DELIVERY

I hereby certify that on the 31st day of August, 1987, I mailed, first class postage prepaid, a true and correct copy of the foregoing to:

Henry S. Nygaard
333 North 300 West
Salt Lake City, Utah 84103

Bernard Tanner
130 State Capitol Building
Salt Lake City, Utah 84114

Reed Maxfield
410 East 7620 South
Midvale, Utah 84047

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